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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~329.~~ 103 47

JOHN G. BLOUNT, PLAINTIFF IN ERROR,

VS.

R. C. WINDLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

[illegible]

FILED NOVEMBER 8, 1873.

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Jurisdiction

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TRANSCRIPT FROM SUPERIOR COURT.

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1 *Caption.*

NORTH CAROLINA, *ss :*

Pleas in the supreme court of North Carolina, held at the court-room in the capitol, in the city of Raleigh, in the State of North Carolina aforesaid, before the honorable Richmond M. Pearson, chief-justice, presiding, and the honorable Edwin G. Reade, William B. Rodman, Nat. J. Boyden, and Thomas Settle, associate justices of said supreme court, on Monday, the 3rd day of February, in the January term of said court, in the year of our Lord one thousand eight hundred and seventy-three, convened on the first Monday in January, in said year, being the sixth day of said month.

WM. H. BAGLEY, *Clerk.*

Title of cause.

JOHN G. BLOUNT, COMMISSIONER OF THE Bank of Washington, plaintiff,
against
R. C. WINDLEY, DEFENDANT.

Filing of transcript.

2 Be it remembered that, on the 25th day of May, in the year of our Lord one thousand eight hundred and seventy-two, John G. Blunt, commissioner of the Bank of Washington, plaintiff, by Ed. Graham Haywood, his attorney, filed in the office of the clerk of the supreme court of North Carolina a transcript of a record and judgment in a controversy, submitted without action, under title xiv, chapter i, sections 315, 316, and 317 of the Code of Civil Procedure of North Carolina, from the superior court of Beaufort County, in said State, in which said controversy the said John G. Blount, commissioner of the Bank of Washington, was plaintiff, and the said R. C. Windley was defendant; together with an appeal by the said plaintiff from the judgment of the said superior court of Beaufort County, rendered in said controversy, and at the same time and place filed a bond to prosecute his said appeal with effect; which said transcript, appeal, and bond are in the words and figures following, to wit:

3 *Transcript from superior court of Beaufort County.*

Superior court, Beaufort County, spring term, 1872.

JOHN G. BLOUNT, COMMISSIONER OF THE Bank of Washington, plaintiff,
against
R. C. WINDLEY, DEFENDANT.

Be it remembered that heretofore, to wit, at a superior court begun and held for the county of Beaufort, at the court-house, in Washington, on the sixth Monday after the third Monday in February, being the first day of April, in the year of our Lord one thousand eight hundred and seventy-two, before the honorable Samuel W. Watts, judge, presiding, come the aforesaid parties, plaintiff and defendant, by their respective attorneys, and agree upon the following case containing the facts upon which the controversy between them depends, and present a submission of the same to the court here, to hear and determine the case and render judgment thereon.

Case agreed.

4 At fall term, 1866, of Beaufort superior court of equity, held at the court-house, in Washington, on the eighth Monday after the fourth Monday of September, A. D. 1866, being the nineteenth day of November, upon the petition of the stockholders of the Bank of Washington, a banking corporation chartered by the general assembly of North Carolina before A. D. 1861, there was a decree of that court vesting all the real and personal property and choses in action of the Bank of Washington, in the plaintiff, John G. Blount, as commissioner, pursuant to a statute of North Carolina, ratified March twel'th, A. D. 1866, entitled "An act to enable the banks of this State to close their business," for the benefit of such of the creditors of said bank as proved their debts within twelve months.

The notices and advertisements required by said statute were made and given, and the same in all respects complied with. At fall term, 1867, of Beaufort superior court of law, held at the court-house,
5 in Washington, on the eighth Monday after the fourth Monday
in September, A. D. 1867, being the eighteenth day of November, the plaintiff, John G. Blount, as commissioner as aforesaid, recovered judgment against the defendant, R. C. Windley, (as surety for one A. T. Redditt, on a promissory note,) for $1,735.50, with interest from the first of November, 1867, until paid, and his costs of suit, which note was for money borrowed from the Bank of Washington, was made payable to the cashier of said bank, and dated before the first of May, 1865. After the adjournment of the court last aforesaid execution was duly issued on said judgment against the goods and chattels, lands and tenements of the defendants, returnable to fall term, 1868, of said court.

Subsequent to the issuing of this execution the defendant Windley obtained bank-bills of the Bank of Washington to an amount sufficient in nominal value to cover the plaintiff's judgment, principal,
6 interest, and costs, and tendered them to the plaintiff in payment
thereof, which tender the plaintiff refused to accept, and the defendant then deposited said bills with the clerk of Beaufort superior court, who received them, not in payment of the judgment, but subject to the order of the court in the case.

At fall term, 1868, of said court there was a motion in the cause by the defendant to set aside the aforesaid judgment, which motion remained pending until spring term, 1872, and was then, on the hearing, after argument, disallowed by the court.

WARREN & CARTER,
Plff's. Attys.
SATTERTHWAITE & MURRAY,
Attys. for Deft.
SPARROW & SHEPHERD,
Attys. for Deft.

Motion by defendant to have satisfaction entered on record.

And thereupon, on the first of April, eighteen seventy-two, at the said spring term eighteen seventy-two, of the court here, comes the defendant, R. C. Windley, by his attorneys aforesaid, and moves the court to have the bank-bills of the Bank of Washington heretofore de-
7 posited by him with the clerk of this court, received by the plaint-
iff in payment of his aforesaid judgment against the defendant, and the same declared satisfied of record.

Argument of motion.

Which motion coming on to be heard by the court is argued by Saterthwaite and Murray, and Sparrow & Shepherd, for the defendant, and Warren & Carter for the plaintiff, and the court having taken said motion under advisement, and being now fully advised in the premises, doth order and adjudge:

Order and judgment of the court.

That the said motion of the defendant be allowed; and that the clerk of this court receive the said bank bills of the Bank of Washington, in behalf of the plaintiff, in payment and satisfaction of the plaintiff's aforesaid judgment against the defendant; and that the said clerk enter satisfaction of the said judgment on the record.

SAMUEL W. WATTS, *Judge.*

8 *Appeal to the supreme court of N. C.*

To which several opinions of the said court allowing the defendant's said motion, and ordering satisfaction of the plaintiff's judgment to be entered of record. and the judgment thereon herein rendered, the said plaintiff, by his said attorneys, now and here excepts, and prays an appeal from said decision and judgment to the supreme court of North Carolina; which appeal is allowed by the court, upon the plaintiff's filing an appeal-bond as required by law, in the penal sum of two hundred and fifty dollars. And thereupon further notice of appeal is waived by the defendant, by his attorneys aforesaid.

WARREN & CARTER, *Plff's. Atts.*
SATTERTHWAITE & MURRAY,
Atts. for Deft.
SPARROW & SHEPHERD,
Atts. for Deft.

Filing of appeal-bond & exceptions.

9 And afterwards, on the fifteenth day of April, eighteen seventy-two, comes the plaintiff within ten days after his said appeal taken, and files the following appeal-bond and the annexed exceptions to the judgment and proceedings herein.

Bond.

NORTH CAROLINA, *Beaufort County:*

Know all men by these presents that we, Jno. G. Blount and D. M. Carter, are held and firmly bound unto R. C. Winley in the sum of two hundred and fifty dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators.

Witness our hands and seals the 15th of April, 1872.

The condition of the above obligation is such that whereas the abovebounden John G. Blount has taken an appeal from the superior court of Beaufort County in the case of John G. Blount, commissioner, against R. C. Windley:

Now, if said Blount shall prosecute his said appeal with effect, then this obligation to be void; otherwise to remain in full force.

D. M. CARTER. [SEAL.]

Witness:
GEO. L. WINDLEY, *Clerk.*

10 *Exceptions of plaintiff.*

NORTH CAROLINA, *ss:*

In supreme court, of June term, A. D. 1872.

JOHN G. BLOUNT, COMMISSIONER OF THE BANK of Washington, plff.,
against.
R. C. WINDLEY, DEFENDANT.

Exceptions to decision and judgment of the superior court of Beaufort County herein.

And now comes the plaintiff and appellant, and excepts to the decisions, order, and judgment herein.

1. Because the plaintiff has the right, under the Constitution, and coinage and legal-tender laws of the United States, as well as under the laws of North Carolina, to receive the lawful currency of the United States of America, in satisfaction and discharge of his judgment against the defendant.

2. Because the act of the general assembly of North Carolina, ratified the 22d of August, 1868, entitled "An act to make bank-bills a set-off;"
and the act ratified the 17th March, 1869, entitled "An act to
11 amend an act entitled "An act to make bank-bills a set-off;" and
the act ratified 13th December, 1869, entitled "An act to require bank-bills to be received in payment of judgments recovered by the old banks of the State on certain contracts," and neither and none of said acts embrace within their operation debts originally due banks which had been "bona fide" assigned before any of said statutes were enacted and ratified.

3. Because none of the said acts of the general assembly of North Carolina embrace within their operation debts once due a bank which had, before these enactments, or any of them, been "bona fide" assigned to the "commissioner of a bank" under the provisions of the act ratified March 12th, 1866, entitled "An act to enable the banks of the State to close their business."

4. Because if said acts, or any one or more of them, be so construed as to embrace within their or its operations a debt once due to a bank, but assigned "bona fide" to the plaintiff before such act or acts was
or were enacted and ratified, the act or acts so construed as
12 aforesaid is or are invalid because repugnant to the Constitution
of the United States, and also repugnant to the constitution of North Carolina.

5. Because all of said acts, as well as the 22nd section of the ordinance of the convention of North Carolina, ratified June 23rd, 1866, entitled "An ordinance to change the jurisdiction of the courts, & the rules of pleading therein," were enacted and ratified after the defendant's negotiable note to the Bank of Washington was made and delivered to the bank, and in so far as such legislation, or any of it, impairs the negotiability of said note, it is invalid, because repugnant to the Constitution of the United States.

ED. GRAHAM HAYWOOD,
Atty. for Plaintiff & Ap'ellant.

Certificate of clerk of the superior court of Beaufort County.

I, G. L. Windley, clerk of the superior court for the county of Beaufort, and State of North Carolina, do hereby certify that the foregoing
contains a full, true, and perfect transcript of the record in a con-
13 troversy, submitted without action, lately pending in said court,
between John G. Blount, commissioner of the Bank of Washington, plaintiff, and R. C. Windley, defendant; and that the accompanying bond is the original appeal-bond, duly executed and filed by the plaintiff herein.

SEAL OF THE SUPERIOR COURT OF BEA'FORT COUNTY.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at office in Washington, this 18th day of May, A. D. 1872.

GEO. L. WINDLEY, *Clerk.*

Proceedings in supreme court, at June term, A. D. 1872.

STATE OF NORTH CAROLINA, *ss:*

And be it remembered that at a term of the supreme court of North Carolina, begun and held for the State of North Carolina, at the court-room in the capitol, in the city of Raleigh, in the State of North Carolina aforesaid, before the honorable Richmond M. Pearson, chief-justice, presiding, and the honorable Edwin G. Reade, William B. Rodman,
Robert P. Dick, and Nat. J. Boyden, associate justices of said
14 supreme court, on the first Monday in June, in the year of our
Lord one thousand eight hundred and seventy-two, being the third day of June, come the said John G. Blount, commissioner of the Bank of Washington, by his attorney, Ed. Graham Haywood, and the said R. C. Windley, by his attorney, S. F. Phillips, and the following proceedings are had and entered in the cause of—

Argument of appeal, and curia advisare vult.

JOHN G. BLOUNT, COMMISSIONER OF THE
Bank of Washington, appellant,
against
R. C. WINDLEY, APPELLEE.

This cause coming on to be argued upon the transcript of the record from the superior court of Beaufort County, is accordingly argued by Haywood for the plaintiff and appellant, and Phillips for the defendant and appellee, and is heard by the court; and because the justices here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid here, until the first Mond'y in January, A. D. 1873, to hear their judgment thereupon, for that the said justices here are not yet advised thereof, &c., &c.

15 *Order for re-argument.*

At which day, before the justices here, it is now ordered and adjudged that two of the questions arising herein be re-argued, viz:

1st. Do the acts of 17th of March and 13th of December, 1869, embrace within their operation a case where a bank had made an assignment?

2nd. If so, are the acts constitutional?

Proceedings in supreme court, at January term, 1873.

STATE OF NORTH CAROLINA, *ss:*

And be it remembered that at a term of the supreme court of North Carolina, begun and held for the State of North Carolina, at the place and before the chief-justice and the associate justices and at the time hereinbefore in the caption of this transcript particularly set out, to wit, on Monday, the third day of February, in the January term of said court, A. D. 1873, convened on the first Monday in January in said year, being the sixth day of said month, come the said John G. Blount, as well as the said R. C. Windley, by their respective attorneys aforesaid, when and where the following proceedings are had and entered in the cause of—

16 *Judgment of supreme court, at January term, A. D. 1873, affirming decision of superior court.*

JOHN G. BLOUNT, COMMISSIONER OF the Bank of Washington, appellant,
against
R. C. WINDLEY, APPELLEE.

This cause coming on to be heard and re-argued upon the transcript of the record from the superior court of Beaufort County, and being argued by counsel, and heard by the court, and, all and singular, the premises being seen, and by the said justices here fully understood, and mature deliberation being thereupon had, it appears to the court here that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid; therefore it is considered and adjudged by the court here that the order and judgment aforesaid, in form aforesaid, given by the superior court of Beaufort County, be in all things affirmed, and stand in full force and effect, the said causes and matters above for error assigned in anywise notwithstanding; and it is further considered and adjudged that the opinion of this court, as delivered by the 17 honorable R. M. Pearson, chief-justice, be certified to the said superior court of Beaufort County; and it is further considered and adjudged that the said R. C. Windley do recover against the said John G. Blount and David M. Carter, his surety for his appeal herein, the costs of said appeal, in this court incurred, to wit, the sum of twenty-nine & $\frac{30}{100}$ dollars, ($29.30); and let execution issue therefor.

Filing of supersedeas-bond.

And on this day, to wit, the twenty-fourth day of February, A. D. 1873, comes the said John G. Blount, by his said attorney, and files in the office of the clerk of the supreme court of North Carolina his appeal and supersedeas-bond in said cause, which said bond is in the words and figures following, to wit:

Supersedeas-bond.

STATE OF NORTH CAROLINA, *ss:*

JOHN G. BLOUNT, PLAINTIFF,
against
R. C. WINDLEY, DEFENDANT.

18 Know all men by these presents that Jno. G. Blount and W. R. S. Bur*k*ank and D. M. Carter are held and firmly bound unto R. C. Windley in the sum of one thousand dollars, to the payment whereof, well and truly to be made, we do hereby bind ourselves, our

heirs, executors, and administrators, jointly and severally, by these presents. Witness our hands and seals this 4th day February, A. D. 1873.

The condition of the above obligation is such that whereas the above bounden Jno. G. Blount hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of North Carolina, held on the first Monday in January, A. D. 1873: Now, if the above-named Jno. G. Blount shall prosecute his said writ to effect, and answer all damages and costs if he shall fail to make good his said plea, then this obligation to be void; otherwise the same shall remain in full force and virtue.

JNO. G. BLOUNT. [SEAL.]
W. R. S. BURBANK. [SEAL.]
D. M. CARTER. [SEAL.]

Signed, sealed, and delivered in presence of—

19 *Justification of sureties.*

Office of the clerk of the superior court of Beaufort County, State of North Carolina.

On this 4th day of February, A. D. 1873, personally appeared before me, Geo. L. Windley, clerk of the superior court of Beaufort County, North Carolina, a court of record, Jno. G. Blount, W. R. S. Burbank, and David M. Carter, and acknowledged the execution of the foregoing band, and the said W. R. S. Burbank and D. M. Carter, having been duly sworn by me, did each depose and say, on his oath, that each of them is worth more than one thousand dollars over and above and free and clear from any and all incumbrances or liabilities of every kind.

D. M. CARTER.
W. R. S. BURBANK.

Sworn to and subscribed before me.

SEAL OF SUPERIOR COURT, BEAUFORT COUNTY.

GEO. S. WINDLEY,
Clerk S. C. B. C.

Approval by chief-justice.

Approved. The clerk will issue transcript.

R. M. PEARSON, *Ch. J. S. C.*

February 24th, 1873.

20 *Filing of agreement to amend writ of error, &c.*

And on this day, to wit, the 17th day of June, A. D. 1873, come the said Jno. G. Blount and R. C. Windley, by their respective attorneys aforesaid, and file in the office of the clerk of the supreme court of North Carolina an agreement to amend the writ of error and citation herein in the words and figures following, to wit:

Agreement.

In supreme court of North Carolina, June 17th, 1873.

UNITED STATES OF AMERICA,
State of North Carolina, ss:

JOHN G. BLOUNT, PLAINTIFF IN ERROR,
vs.
R. C. WINDLEY, DEFENDANT IN ERROR.
Writ of error to Supreme Court of United States.

We, on behalf of the parties to this action, do consent and agree that the writ of error and citation herein may be amended by making them returnable on the second Monday in October, A. D. 1873, instead of the first Monday in December, A. D. 1873.

E. GRAHAM HAYWOOD,
Atty. for Plaintiff in Error.
S. F. PHILLIPS, *for Deft. in Error.*

21 *Certificate by clerk supreme court of N. C.*

NORTH CAROLINA, *ss:*

I, Wm. H. Bagley, clerk of the supreme court of North Carolina, do hereby certify the above and foregoing to be a full, true, and perfect transcript, from the record, of all the proceedings which have been had in the cause in said court wherein John G. Blount, commissioner of the Bank of Washington, is plaintiff and appellant, and R. C. Windley is defendant and appellee, as appears from the records of said court remaining in my custody; and that the petition for the writ of error filed herein by the said plaintiff and appellant, and the writ of error and citation issued herein by the plaintiff in error, are herewith appended to this transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Raleigh, in said State of North Carolina, this twenty-sixth day of August, A. D. 1873.

[SEAL.] WM. H. BAGLEY, *Clerk.*

22 *Petition for writ of error, Feb. 4th, 1873.*

NORTH CAROLINA, *ss:*

JOHN G. BLOUNT, PLAINTIFF,
v.
R. C. WINDLEY, DEFENDANT.

To the Hon. Richmond M. Pearson, chief-justice of the supreme court of N. C.

The petition of John G. Blount respectfully showeth:

That at January term, A. D. 1873, of the said court, held on the first Monday of January, A. D. 1873, a judgment was rendered against your petitioner in a certain matter then and there pending before said court, wherein your said petitioner was plaintiff and one R. C. Windley was defendant.

That in such action was drawn in question the validity of two statutes, and an ordinance of the State of North Carolina, on the ground of their being repugnant to the Constitution of the United States, and the decision made by such judgment was against your petitioner, 23 and in favor of the validity of such statutes and ordinance.

That in said action was also drawn in question the validity of an authority exercised under the State of North Carolina, on the ground of its being repugnant to the statutes of the United States, and the decision made by such judgment was against your petitioner and in favor of the validity of such authority.

That in said action a right and privilege was set up and claimed by your petitioner under the Constitution and statutes of the United States, and the decision made by such judgment was against the right and privilege so set up and claimed by your petitioner under said Constitution and statutes of the United States.

And that such decision and judgment are final. All which appears of record in the said supreme court of North Carolina.

Your petitioner, therefore, desires to prosecute a writ of erro
24 in the Supreme Court of the United States to review said deci-
sion and judgment in that tribunal; and to that end prays your honor to allow him the same and such other process as may be required in that behalf. And your petitioner will ever pray, &c.

JNO. G. BLOUNT,
By his Atty., ED. GRAHAM HAYWOOD.

Allowed:

R. M. PEARSON, *Ch. Jus.*

FEBRUARY 24TH, 1873.

(Indorsed:) John G. Blount, pltff., v. R. C. Windley, def'd't. Petition for writ of error to the Supreme Court of the United States.

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of North Carolina, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of the said State in which a decision could be had in the said suit between John G. Blount, plaintiff, and R. C. Windley, defendant, wherein was drawn in question the validity of two statutes, and an ordinance of the said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity; and wherein was also drawn in question the validity of an authority exercised under said
State, on the ground of its being repugnant to the statutes of the
26 United States, and the decision was in favor of such its validity;
and wherein also a right and privilege was set up and claimed by the said John G. Blount, under the Constitution and statutes of the United States, and the decision was against the right and privilege so set up and claimed under the said Constitution and statutes, a manifest error hath happened, to the great damage of the said John G. Blount, as by his complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next,
in the said Supreme Court to be then and there held, that the
27 record of proceedings aforesaid being inspected, the said Supreme
court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief-Justice of the said Supreme Court, the 24th day of February, in the year of our Lord one thousand eight hundred & seventy-three.

[SEAL.] N. J. RIDDICK,
Clerk U. S. Circuit Court, Eastern Dist. of N. C.

(Indorsed:) John C. Blount, pltff. in error, v. R. C. Windley, def'd't in error. Writ of error.

28 UNITED STATES OF AMERICA, *ss:*

To R. C. Windley, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of North Carolina, wherein John G. Blount is plaintiff and you are defendant in error, to shew cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Richmond M. Pearson, chief-justice of the supreme court of the State of North Carolina, this 24th day of February, A. D. 1873.

R. M. PEARSON, *Ch. Jus.*

29 NORTH CAROLINA,
Beaufort County:

R. W. Wharton, being duly sworn, says that on the 27 day of February, 1873, he served the within citation on R. C. Windley, personally, by showing him the original and leaving a copy thereof with him.

R. W. WHARTON.

Sworn & subscribed before me this 27th day of February, 1873.
[SEAL.] GEO. L. WINDLEY,
Clerk of Supreme Court of Beaufort County.

(Indorsed:) John G. Blount, pl't'ff in error, v. R. C. Windley, def'd't in error. Citation to Supreme Court of the United States. Executed. R. W. Wharton.

(Indorsement on cover:) No. 329. John G. Blount, plaintiff in error, vs. R. C. Windley. North Carolina. Supreme Court. Filed 8th November, 1873.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

No. 103.

JNO. G. BLOUNT, Plaintiff in Error,

VS.

R. C. WINDLEY.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR,

BY

ED. GRAHAM HAYWOOD.

RALEIGH:
JOHN NICHOLS & CO., BOOK AND JOB PRINTERS.
1875.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

No. 103.

JNO. G. BLOUNT, Plaintiff in Error,

VS.

R. C. WINDLEY.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR,

BY

ED. GRAHAM HAYWOOD.

RALEIGH:
JOHN NICHOLS & CO., BOOK AND JOB PRINTERS.
1875.

SUPREME COURT OF THE UNITED STATES, } *No. 103.*
October Term, A. D. 1875.

JNO. G. BLOUNT, Plaintiff in Error,
VS.
R. C. WINDLEY, Defendant.
} **Brief for Plaintiff in Error.**

Statement of the Case.

1. The Bank of Washington was a banking-corporation, created, organized, and existing before A. D. 1861, under and by virtue of an Act of the General Assembly of N. C., entitled—"*An Act to incorporate a "Bank in the town of Washington, in the county of Beaufort,*" ratifiod 22nd January, 1851.

***Laws of N. C.*, 1850-'51, ch. 8, p. 10.**

2. Before the 1st of May, 1865, the Defendant made his negotiable promissory-note to the Cashier of said Bank, for money then borrowed of the Bank.

3. The record does not disclose that there was any *express* provision in said Act of 22nd January, 1851, chartering the Bank, which required the Bank to receive its own bills, as money, in payment of debts due to it; or which incorporated into a negotiable note, made to the Bank, an agreement, that it was payable in the bills of the Bank. When the Bank was organized, and when the Defendant's note was made to it, there was no *express* provision in any *general statute* of the State, which had, or to which was attributed, any such effect. The old English Statute of *set off*, had been re-enacted in N. C., many years before, *in totidem verbis*, and was then in force, and has never been repealed (*Rev. Code, N. C.*, ch. 31, sec. 77, p. 176.); and, in fact, the only provisions in the Act of 22nd Jan., 1851, touching the bills issued by the Bank, and notes payable to it, are to be found in the 3rd section thereof, wherein it is enacted that the stockholders of the corporation, by the name of The Bank of Washington—"shall be, and they are hereby made "able and capable in law, to have, purchase, receive, possess, enjoy, "and to retain to themselves and successors, lands, tenements, rents, "hereditaments, goods, chattels, and *effects*, and the same to *grant*, *de-*

"*mise, alien, and dispose of;*" in the 7th section thereof, wherein it is enacted: "That the said corporation shall neither directly nor indi- "rectly trade in anything except bills of exchange; *promissory* notes and "*bonds, expressing on the face of them to be negotiable and payable at said* "*bank, or its branch* or *agency;* gold or silver bullion; &c., &c.;" and in the 9th section thereof, wherein it is enacted—"That *bills or notes which* "*may be issued by order of the said corporation*, signed by the President "and countersigned by the Cashier, *promising the payment of money* to "any person or persons, his, her, or their order, or to *bearer*, though "not under the seal of said corporation, *shall be binding and obligatory* "*on the same, in like manner, and with like force and effect, as upon any* "*private person or persons*, &c., &c."

4. While the Bank so held the Defendant's negotiable note, the General Assembly of N. C., by an Act, entitled—"*An Act to change the ju-* "*risdiction of the Courts, and the rules* of pleading therein"—ratified 10th March. 1866—provided—"That in all suits brought by any bank "of the State, or by any assignee or endorsee of said bank, or by any "officer of said bank, it shall and may be lawful for the Defendant or "Defendants to set-off by a plea or on trial any note issued by said bank "or its branches, whether the same has been presented for payment or "not, any law or usage to the contrary notwithstanding; but said plea "of set-off, or set-off on trial, shall not avail to cary costs against the "Plaintiff, unless there has been a tender of such payment before suit "has been brought."

Laws of N. C., 1866, ch. 16, sec. 15, p. 22.

This is the first law enacted in N. C. to make bank-bills a set-off—"*whether the same had been presented for payment or not;*" theretofore, bank-bills were not *due and a cause of action*, until *demand* on the Bank, and a *refusal* to make payment, (*Crawford, vs. Bank of Wilmington.* Phil. p. 136); and to avail him as a defence, the claim offered to be set-off by the defendant against the plaintiff's demand, must have been a *debt due* to the defendant by the plaintiff *at the time when the suit was begun*, (*Rev. Code of N. C.*. ch. 82, sec. 77, p. 176; *Babington on Set-off*, pp. 68, 69; *Haughton, vs. Leary*, 3 Dev. & Bat,, p. 21; *Mizell, vs. Moore*, 7 Ired., p. 225; *Waterman on Set-off*, &c., pp. 74 to 79,); also, where the plaintiff was the assignee of an *overdue* negotiable instrument—*a debt due by the assignor to the defendant at the date of the assignment*, (*Haywood vs. McNair*, 3 Dev., p. 231; 2 Dev. & Bat., p. 283; *Turner vs. Reggarley*, 11 Ired., p. 331; *Wharton vs. Hopkins*, 11 Ired., p. 505; *Little vs. Dunlap*, Bus., p. 40.)

5. At the same session of the General Assembly, by an Act entitled—"*An Act to enable the Banks of the State to close their business*"—ratified 12th March, 1866—it was provided, among other things, as follows:

"Whereas, The financial policy of the Federal Government, adopted "to maintain the national credit. with the heavy taxes imposed by that "Government, on the banks of the State, makes it absolutely necessary "that said banks should close their business, and renders a further con"tinuance of their corporate existence idle and useless to the people of "the State.

"SECTION 1. Be it enacted by the General Assembly of the State of "North Carolina, and it is hereby enacted by the authority of the same, "That if the stockholders of any of the banks, chartered by the General "Assembly of this State, shall be unwilling to close the business of "their banks, by an assignment, and are desirous to appropriate all "the estate and effects of such bank, for the benefit of its creditors, and "to close its business and surrender their chartered rights and fran"chises, in conformity with the subsequent provisions of this act, such "stockholders may, by their bill in equity, in the name of such bank, "filed in the Court of Equity, of the county in which the principal "bank or any of its branches may be located, require the creditors of "such bank to prefer and establish their demands within such time, "(not less than twelve months after decree therefor) as shall be allowed "by the court. The court shall, upon filing such bill, appoint as com"missioner a suitable person acquainted with the business of such bank, "who shall be paid for his services such sum as may be allowed by the "Court. Such commissioner shall give bond, with ample security, pay"able to the State for the faithful discharge of his duties, in such sum "as shall be approved by the court, which bond shall be filed in court, "and may be sued on for the use of such persons as the court may "allow.

"SEC. 2. Be it further enacted, That the commissioner appointed as "aforesaid, upon filing the bond required of him, shall forthwith be"come, and so long as he shall continue such commissioner, and no "longer, shall be vested with all the estate, effects and rights of action "which such bank possessed, had or held or was vested with, at the "time of filing such bill, and which such bank could at that time have "lawfully sold, assigned or transferred, including all debts due to such "bank or to any person for its use, and all liens and securities therefor. "The court may require such bank, by its cashier or other proper of"ficer, to endorse, without recourse, all such bills or notes, draw all "such checks or orders for money, and execute such other proper wri"tings as the court shall deem necessary or useful to enable the commis"sioner to demand or recover and receive the estate and effects of such "bank for the benefit of its creditors. The commissioner shall have the "like remedy to recover and receive all the estate, debts and effects, be"belonging to such bank at the time of filing its bill, as such bank "might have had if no proceedings had been made under this act; * "* * * *. In all suits, prosecuted by such commissioner at law or "in equity, the plaintiff shall be styled "The Commissioner, (adding "thereto the name of the particular bank for which he has been appointed the Commissione);" * * * * *.

"Sec. 3. Be it further enacted, That the commissioner aforesaid "shall, in all things connected with the discharge of his duties, as commissioner, act under the direction and orders of the court; * * *

"Sec. 4. Be it further enacted, That all demands of creditors may "be preferred and proved before such commissioner, and for all purposes connected with the investigation of the demands of any person, "claiming to be a creditor, as aforesaid, the commissioner shall have "power to administer all oaths required in the course of such proceedings. Any supposed creditor, whose claim shall be wholly or in part "disallowed by any commissioner, may appeal to the court, when the "same shall be determined according to the course of the court or decided at law, as the court may direct; and in all such appeals the case "shall be docketed in the name of the creditor against "The commissioner of (adding the name of the bank of which he is commissioner);" "and shall be tried and determined as like suits between the other parties. In all cases in which any such commissioner shall be a party, "whether plaintiff or defendant, and it shall appear that there has "been mutual credit given by the bank and any other corporation or "any person, who is the opposite party, or there are mutual debts between them, whether such debts be due and payable or not, or whether "demand has been made for the same or not, the account between the "parties shall be stated, and one debt shall be set off against the other, "and the balance of such account only shall be allowed or paid on either "side respectively, and costs, in all cases, shall be paid by either party, "as the court shall direct. The commissioner shall, from time to time, "prepare statements in writings of all claims allowed by him, showing "the character of such claims and the evidence on which their validity "is based, and there shall be no application of any funds in the hands "of such commissioner to the satisfaction in whole or in part of any "claims whatever, except under a rule or order of the court therefor.

"Sec. 5. Be it further enacted, That the court shall make all proper "orders and decrees for the collection of the assets of such bank, of "every nature and description, and for the payment of the costs and "expenses incident to the proceedings. The creditors, whose claims "and demands have been proved and established, as aforesaid, against "the estate and effects of such bank, in the hands of the commissioner, "shall be entitled to payment in satisfaction of the same out of the "assets in hands of such commissioner as the court shall order and "direct; and all such claims and demands not presented, proved and "established, according to the provisions of this act, within the time "allowed by the decree of the court therefor, shall be debarred of recovery by any action at law or other proceeding in equity; and any "suit brought for their recovery, otherwise than is herein provided, "shall, on the plea of the commissioner of such bank, be abated, or on "his motion dismissed.

"Sec. 6. Be it further enacted, * * * * * * *.

"Sec. 7. Be it further enacted, * * * * * * *.

"Sec. 8. Be it further enacted, That the filing by or on behalf of "any bank, of a bill in the court of equity under the provisions of this "act, shall, upon the appointment and qualification of a commissioner, "thereunder, be deemed and taken to all intents and purposes to be a "surrender by such bank of all the corporate rights and franchises "granted to such bank; and all laws by virtue of which any such bank "then exists as a corporation, are hereby repealed, and such corporation "shall be thereupon dissolved, and all the effects and consequences following or incident to the dissolution of a corporation at common law, "shall ensue thereon, any statute law of this State to the contrary notwithstanding; Provided, however, That the estate, property and "rights of action, vested in the commissioner as provided by this act, "shall not be in any way divested or impaired thereby, nor shall the "right of any creditor of such bank against such commissioner or "against the estate or effects so vested in him be thereby impaired or "in any way effected, and such commissioner shall thereupon be considered as the plaintiff in the pending proceedings;

"And, provided, further, That should there be any balance remaining in the hands of any such commissioner, after the satisfaction of "the claims of such creditors, the commissioner, under the direction of "the court, shall distribute and pay the same to and among those who "shall be justly entitled thereto as having been stockholders and members of such corporation at the time of its dissolution, as aforesaid, or "their legal representatives.

"Sec. 9. Be it further enacted, * * * * * * *.

"Sec. 10. Be it further enacted, * * * * * * *."

Laws of N. C., 1866, ch. 3, secs. 1, 2, 3, 4, 5, and 8; pp. 6, 7, 8, and 9.

6. Afterwards, at a Convention of the People of N. C., held in June, 1866, an Ordinance was established, entitled—"*An Ordinance to change "the jurisdiction of the Courts, and the rules of pleading therein*"—ratified on 23rd June, 1866—whereby it was ordained, among other things, as follows:

"Sec 22. Be it further ordained, That in all actions brought by any "bank or other corporation having exercised banking privileges, or by "any assignee or endorsee, or officer of said bank or corporation, it shall "and may be lawful for the defendant to set off by plea or on trial any "note or certificate of deposit issued by said bank or its branches, or "other corporation, whether the same has been presented for payment or not, any "law or usage to the contrary notwithstanding;

"but said plea of set off, or set off on trial, shall not avail to carry "costs against the plaintiff, unless there has been a tender of such "payment before suit brought: Provided, That should the defen"dant require the debt to be scaled according to the scale or de"preciation of Confederate currency, then, and in that case, the said " notes or certificates of deposit shall not be a set off in any manner.

" SEC. 23. Be it further ordained, That * * * * * * * * ; "also an act entitled "*An Act to change the jurisdiction of the Courts and* "*the rules of pleading therein*," ratified the 10th March, A. D 1866, and "all laws in conflict with this ordinance are hereby repealed."

Ordinances of Convention of 1866, ch. xix. secs. 22, 23, pp. 36, 37.

7. With these laws in force, so far as they were consistent with the Constitution of the U. S.—and The Bank of Washington still holding the Defendant's negotiable note—the stockholders thereof, in the name of said Bank, at Fall Term, 1866, of the Court of Equity for Beaufort County, (held 19th Nov., 1866), filed their Bill in Equity against the creditors of said Bank, in full accordance with the Act of 12th March, 1866, herein cited; when and where, there was a decree of said Court, vesting all the real and personal property and *choses in action* of The Bank of Washington, in the Plaintiff, as commissioner, pursuant to said Act. for the benefit of all the creditors of said Bank who proved their debts within twelve months, as required by said decree. The notices and advertisements, required by said Act, were given and made, and the same *in all respects* complied with.

8. The Defendant failed to pay his said negotiable note to the Plaintiff—as Commissioner of the Bank of Washington. The Plaintiff, as such commissioner, instituted an action against the Defendant to compel payment, in the Superior Court of Law of Beaufort County, and at Fall Term, 1767, thereof, (18th Nov., 1867), recovered judgment, on said note, against the Defendant for $1,735.50 with interest thereon until paid—and after the adjournment of the Term, sued out a *Fieri Facias* on said judgment, against the goods and chattels, lands and tenements of the Defendant, returnable to Fall Term, 1868, of said Court—which *Fi. Fa.* was according to N. C. law at that time, *a lien, from its teste*, on all the goods and chattels, lands and tenements, of the Defendant situate in the County to which it was directed.

9. After said judgment was entered, and said *Fieri Facias* issued, the Defendant purchased outstanding bank-bills, of The Bank of Washington to an amount sufficient, in nominal value, to cover the Plaintiff's said judgment, principal, interest, and costs.

10. Also after the said judgment was entered, and the said *Fi. Fa.*

issued, the General Assembly of N. C., by an Act entitled "*An Act to* "*make bank-bills a set off*," ratified 22nd August, 1868, provided as follows:

"SECTON 1. The General Assembly of North Carolina do enact, That "where any note or bond has been, or may hereafter be given as a renewal "of any debt or demand due or payable to any Bank in this State, whose "charter bears date prior to the 20th day of May, 1861, the bills of said "Bank shall be a legal set off to such note or bond, without regard to "whether such note or bond be made payable to said Bank or to some "other party; and the bills of such Bank may be offered, and shall be "received to sustain the plea of set off to any suit brought upon such "note or bond in any Court of this State, whether such note or bond be "made payable to such bank or to any other party.

"SEC. 2. This act shall be in force from and after its ratification."

Laws of N. C., 1868, ch. 47, p. 67.

And by an act entitled, "*An act to amend an act entitled an act to make* "*bank-bills a set off*," ratified 17th March, 1869, provided as follows:

"SECTION 1. The General Assembly of North Carolina do enact, That "an act entitled an act to make bank-bills a set off, ratified the twenty-"second day of August, Anno Domini, eighteen hundred and sixty-eight, "be so amended as to apply to judgments and executions which may have "been obtained on any debt due any of the banks mentioned in the afore-"said act.

"SEC. 2. That when any person shall have given his or her note or "bond, since the first of May, eighteen hundred and sixty-five, to any of "said banks, the consideration of which was specie, they shall not be "entitled to the benefit of this act, or the one to which this is amenda-"tory.

"SEC. 3. The provisions of section one in this act, shall apply to all "cases where such notes or bonds are given to any President, Cashier "or other person, for the benefit or interest of such banks, and also in "all cases where any note or bond has been given in lieu of any note or "notes, bond or bonds, to any banking association, or for the benefit of "the same.

"SEC. 4. The remedy under this act may be by plea of set off, or by in-"junction, as the case may require."

Laws of N. C., 1868–'69, ch. 77, p. 1872.

And by an act entitled "*An act to require bank-bills to be received in pay-* "*ment of judgments recovered by the Old Banks of this State, on certain* "*contracts*," ratified 13th December, 1869, provided as follows:

"SECTION 1. The General Assembly of North Carolina do enact, That "when any judgment has been or shall hereafter be recovered in any "court of this State, upon any note payable to or any contract made with "any bank chartered by this State, or to or with any officer of such "bank for the beuifit of such bank, prior to the first day of May, one "thousand eight hundred and sixty five, it shall and may be lawful for "the defendants in such judgments to pay and satisfy the same (the "costs excepted) with the bills of the bank to which or to some officer "of which the note was payable, or with which or some officer of which "the contracts were made; and it shall be the duty of every court of "this State, upon proof that such bills have been delivered or tendered "and refused in satisfaction of such judgments to the nominal amounts "thereof, to cause an entry of the satisfaction of such judgments to be "entered of record in the court wherein the same was received.

"Sec. 2. This act shall be in force from its ratification."
Laws of N. C., 1869-'70, ch. 4, p 46.

And by an act entitled, "*An act to amend section twenty-one of an Ordinance of the Convention, &c., &c.*, ratified June 23rd, 1868, &c., &c.," ratified 4th March, 1871, provided as follows:

"Section 1. The General Assembly of North Carolina do enact, That "the twenty-first section of an ordinance of the convention of one thousand eight hundred and sixty-six, entitled an ordinance respecting the "jurisdiction of the courts of this State, ratified June twenty-third, one "thousand eight hundred and sixty-six, amended and re-ratified by the "convention of one thousand eight hundred and sixty-eight, be amended "as follows, viz: insert the words 'or receiver' betwen the words 'indorse' and 'or' in the third line from the beginning of said section, "and also insert the words 'and whether or not the same was in the possession of the defendant at the time of suit brought,' between 'not' "and 'any' in the eighth line from the bottom of said section, and strike "out all in said section after and including the word 'provided' in lines "four and five from the bottom of said section, as printed in the code "of civil procedure; so that twenty-first section of said ordinance, as "amended, shall read as follows, viz: That in all actions brought by "any bank or other corporation having exercised banking privileges, or "by any assignee or endorsee or receiver or officer of said county or corporation, it shall and may be lawful for the defendant to set off by plea "or on trial any note or certificate of deposit issued by said bank or its "branches or other corporation, whether the same has been presented "for payment or not, and whether or not the same was in the possession "of the defendant at the time of suit brought, any law or usage to the "contrary notwithstanding; but said plea of set off or set off on trial shall "not avail to carry costs against the plaintiff unless there has been a "tender of such payment before suit brought.

"Sec. 2. That this act shall be in force from and after its ratification."
Laws of N. C., 1870-'71, ch. 113, p. 174.

11. The Plaintiff's aforesaid judgment still remaining unsatisfied, the Defendant tendered to him, in payment thereof, the bank bills of the Bank of Washington, which the Defendant had acquired as aforesaid, and still held; but the Plaintiff refused to receive said bank-bills in payment and satisfaction of his said judgment. Whereupon the Defendant filed said bank-bills in the office of the Clerk of the Superior Court of Beaufort county; and, at Spring Term, 1872, of said court (held 1st April, 1872), commenced proceedings against the Plaintiff in said Court in the nature of an *Audita Quere'a*, to compel him to accept said bank-bills in payment and satisfaction of his said judgment, and to enter satisfaction thereof on the record.

12. No formal writ of *Aud ta Querela* was sued out by the Defendant, nor were any formal proceedings instituted in said Court to compel the appearance and attendance of the Plaintiff, but, under a provision of the "*Code of Civil Procedure*" of N. C., which permits a controversy to be submitted to the court, without action, and the same proceedings to be had therein as if an action had been formally instituted (*Code of Civil Proc.*, secs. 315, 316, 317;—*Battle's Revisal*, ch 17, secs 315, 316, 317, p. p. 218, 219), the Plaintiff and Defendant embodied the controversy between them in a *Case Agreed*, containing the facts hereinbefore set out, and submitted the same to said Superior Court of Beaufort county for judgment thereon, at said Spring Term thereof, 1872.

Printed Record, p p. 1 and 2.

13. The Superior Court of Beaufort county, at the same term, (Spring Term, 1872), entered up judgment on the *Case Agreed*, against the Plaintiff, requiring him to receive the bank-bills held by the Defendant as aforesaid, in payment and satisfection of his judgment against the Defendant; and directed satisfaction of said judgment, to be entered upon the record; which entry was then and there made.

Printed Record, p. 3

14. To which decision of said Superior Court, the Plaintiff then and there excepted; and, the *Writ of Error* having been abolished in N. C. (*Code of Civil Procedure of N. C.*, sec. 296; *Battle's Revisal*, ch. 17, sec. 296), appealed to the Supreme Court of N. C. from said decision and judgment against him; and among other exceptions stated, and errors assigned upon said appeal, suggested the following:

(*a.*) That the Plaintiff had the right under the Constitution, and coinage and legal tender laws of the United States, to receive the lawful currency of the United States of America, in satisfaction and discharge of his judgment against the Defendant; which right was denied him by the Superior Court of Beaufort County, and he compelled to accept payment of his said judgment, in the bank-bills of the Bank of Washington.

(*b.*) That the Acts of the General Assembly of N. C. of the 22nd of August, 1868, and of the 17th of March and of the 13th of December, 1869, hereinbefore set out, (if said Acts or any one or more of them, were so construed as to embrace within their or its operation, the Plaintiff's judgment, already rendered before said Act or Acts was or were ratified), were invalid,—because repugnant to the Constitution of the United States, in that they impaired the obligation of contracts—deprived the Plaintiff of his property without due process of law—and make bank-bills, which were neither gold nor silver coin, a tender in payment of the Plaintiff's debt; while the said Superior Court, held that said Acts embraced the Plaintiff's judgment, and were valid.

(*c.*) That all of said acts, as well as the twenty-second section of the Ordinance of the Convention of the 23rd of June, 1866, and the Act amendatory thereof, of the 4th of March, 1871, were invalid, because repugnant to the Constitution of the United States, in that they purported to make bank-bills a legal-tender in payment of debts, and to restrain the negotiability of the Defendant's note, held by The Bank of Washington; while the said Superior Court held, that all of said Acts and said Ordinance were valid.

Printed Record, p. 4.

15. The cause was argued at June Term, 1872, of the Supreme Court of N. C.; and again re-argued at January Term, 1873, of said Court, under a special order of the Court, requiring the constitutionality of the Acts of the 17th March, and of the 13th of December, 1869, to be re-argued before them; and, at said last mentioned term, the said Supreme Court of N. C. gave judgment, affirming, in all respects, the decision and judgment which had been made herein by the Superior Court of Beaufort county.

Printed Record, p.p. 5 and 6.

16. Whereupon the original Plaintiff, John G. Blount, commissioner, &c., prosecuted his *Writ of Error*, returnable to the Supreme Court of the United States, under the 2nd section of the Act of Congress of February 5th, 1867, (Stats. at Large, vol. 14, p. 386; Rev. Stats. of U. S., sec. 709), to remove this cause into the Supreme Court of the United States—in order that said judgment of the Supreme Court of N. C. might be re examined and reversed.

Assignment of the Errors Relied on.

First Error. There is error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said R. C. Windley, and against the said John G. Blount, Commissioner of The Bank of Washington, whereas by the law of the land, the said judgment ought to have been given, for the said John G. Blount, commissioner as aforesaid, against the said R C. Windley.

Second Error. And also there is error in this, that it manifestly appears, by the record aforesaid, that the said John G. Blount, commissioner as aforesaid, had the right, under the Constitution, and coinage, and legal-tender laws of the United States, to receive payment of his judgment from the said R. C. Windley, in lawful money of the United States of America, which right he set up and claimed, and the same was denied him, by the Superior Court of Beaufort County, and by the Supreme Court of N. C.

Third Error. And also there is error in this, that it manifestly appears, by the record aforesaid, that effect and operation were given to the before recited Acts of the General Assembly of N. C., of the 22nd of August, 1868, and of the 17th of March, and of the 13th of December, 1869, notwithstanding the same were invalid, as against the rights of the said John G. Blount, commissioner as aforesaid, subsisting at the dates of their respective ratifications, because repugnant to the Constitution of the United States, in that they impaired the obligations of the contracts, both of the said Windley and of the State of N. C., with the said Blount, and with the stockholders of the Bank of Washington—deprived the said Blount of his property without the due process of law—and required him to accept as lawful tender in payment and satisfaction of his judgment, the bank-bills of The Bank of Washington, which were not gold nor silver coin; and notwithstanding the validity of all of said statutes, was then and there drawn in question, on the ground of their being repugnant to the Constitution and laws of the United States.

Fourth Error. And also there is error in this, that it manifestly appears by the record aforesaid, that effect and operation were given, to the before recited 22nd section of the Ordinance of the Convention of N. C., of the 23rd of June, 1866, and the Act of the General Assembly of N. C., amendatory thereof, of the 4th of March, 1871, notwithstanding the same were invalid in their application to the case made by the said John G. Blount, commissioner as aforesaid, because repugnant to the Constitution of the United States, in that they made something which was not gold and silver coin, a tender in payment of his debt, and purported to impair the negotiability of the promissory note, which had been assigned to said Blount, although its negotiable character was affixed to said note, before the ratification of either of said laws; and notwithstanding the validity of said Ordinance and Statute, was then and there drawn in question, on the ground of their being repugnant to the Constitution and laws of the United States.

ARGUMENT.

On the Manner in which the Questions Herein Arise; and on the Jurisdiction of the Supreme Court of U. S.

I.

1. A judgment in the highest Court of a State, if otherwise a proper subject for review here, under the 2nd sections of the Act of Feby 5th, 1867, is not rendered incapable of being reviewed, by the fact, that judgment was rendered on voluntary submission of a case agreed on for judgment, under the provisions of the Code of the State.

Aldrich vs. Ætna Co., 8 Wall., 491; *Martin vs. Hunter, Lessee*, 1 Wheat., 304, 354; *U. S. vs. Eliason*, 16 Pet., 291, 299; *Stinson vs. Balt. and Sus. R. R. Co.*, 10 How., 345; *Graham vs. Bayne.* 18 How., 60; *Burr vs. The Des Moines R. R and Nav. Co.*, 1 Wall., 99.

2. And a *Writ of Error* will lie to the Supreme Court of U. S, to re-examine and correct errors occurring in proceedings in the nature of an *Audita Querela*

New Orleans R. R. Co. vs. Morgan, 10 Wall. 256.

3. It is apparent upon the face of the record, by necessary and inevitable intendment, that the Plaintiff claimed a right, in the Court of Beaufort County—and also in the Supreme Court of N. C.—to demand lawful money of U. S. in payment of his judgment, under the Constitution of U. S., and the Acts of Congress, regulating the gold and silver coins of U. S., and making them a legal-tender, in payment of all sums according to their nominal and declared values—and also making treasury notes of U. S., a legal-tender in payment of all debts—and that the decisions in both said courts, was against the right so specially set up and claimed, by the Plaintiff in Error. This brings his case, within the *third* class of Federal questions, enumerated in the 2nd section of the Act of 1867.

Trebilcock vs. Wilson et ux., 12 Wall., 687; over-ruling *Roosevelt vs. Meyer*, 1 Wall., 512; *The Banks vs. The Mayor*, 7 Wall., 16; *Briscoe vs. Bank, &c., Ky.*, 11 Pet., 316-317; *Gwin vs. Breedlove*, 2 How. 38.

4. Moreover, this case comes within the *second* class of Federal questions, enumerated in said Act of 1867; it appears upon the face of the record, we think, *expressly*, but certainly, by necessary and inevitable intendment, that the Plaintiff insisted in the Courts of N. C., that certain Statutes of the State, enacted after the Defendant's note was assigned to him, and after he had recovered judgment thereon, were invalid, because repugnant to the Constitution of U. S., in that they impaired the obligation of the Defendant's contract with him—deprived

him of his property without due process of law—and required him to accept something, which was neither gold nor silver coin, in payment of his judgment; and also insisted in said State Courts, that an Ordinance of the State Convention, established before the Defendant's note was assigned to him, was invalid, because repugnant to the Constitution of U. S., in that it impaired the negotiability of the Defendant's note, then held by The Bank of Washington, and purported to make bank-bills a lawful tender in payment of debts; and the decision in both said State Courts, was in favor of the validity of said Ordinance, and all the aforesaid Statutes; for this reason also, there is jurisdiction here, to re-examine the decision of the Supreme Court of N. C. on these points.

Crowell vs. Randall, 10 Pet., 368; *Armstrong vs. Treasurer*, 16 Pet. 281; *Bridge Proprietors vs Hoboken Co*, 1 Wall., 116-141; *Furman vs. Nichol*, 8. Wall., 44.

5. An examination of the Record *proper*, discloses that these Federal questions, were the *only* questions of law at issue, unless the Courts below decided some local point erroneously; and it is settled by decision of this Court, that where there are several questions in the Record, this Court will not presume, that the Court below decided a question of local law erroneously, in order to defeat their own appellate jurisdiction, under the 25th section of the Judiciary Act.

Maguire vs. Tyler, 8 Wall., 650; *Neilson vs. Lagow*, 12 How., 109-110.

6. It is true, if this Court looks into the opinion of the Supreme of N. C.—which it possibly may do, although it forms no part of Record, since the decision of *Murdock vs. Memphis*, 20 Wall., 590—it will appear, that the State Court held, the Acts passed after the Defendant's note was assigned to the Plaintiff, to be valid, because it also held, that by such assignment, the only contract, by the Defendant with the Plaintiff, was, to pay him bank-notes, and that no contract arose to pay him lawful money of U. S. And hence it may be contended, that the validity of these Acts was never drawn in question, and the decision by the State Courts, was only upon the proper construction of its own local laws, and the interpretation of a contract made thereunder, which this Court has no jurisdiction to re-examine. But it has ever been held, that such a construction of the 25th section of the Judiciary Act, would render it wholly inadequate, for the purposes which it professes to have in view, and permit it to be evaded at pleasure; and the decisions of this Court are numerous, wherein it is held—that when it is alleged by a Plaintiff in error in this Court, that a State Statute impairs the obligation, of an existing contract with him, the Court is not governed by the State decision, as to whether there was such a contract, and its terms and extent, but will itself decide, whether there was a contract to be impaired, and what were its terms, and what its obligations.

In *State Bank vs. Knoop*, this Court has said: "The rule observed by "this Court, to follow the construction of the Statute of the State, by "its Supreme Court, is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a Statute of the State, is received as a part of the Statute. "But we are called in the case before us, not to carry into effect a law "of the State, but to test the validity of such a law, by the Constitution of the Union. We are exercising an appellate jurisdiction. The "decision of the Supreme Court of the State is before us for revision, "*and, if their construction of the contract in question, impairs its obligation*, we are required to reverse their judgment. To follow the construction of a State Court in such a case, would be to surrender one "of the most important provisions of the Federal Constitution."

16 How. 391, 392.

In *Jefferson Branch Bank vs. Skelly* this Court has said—"Of what use "would the appellate power be, to the litigant who feels himself aggrieved, by some particular State legislation, if this Court could not "decide, independently of all adjudication by the Supreme Court of a "State, whether or not the phraseology of the instrument in controversy, was expressive of a contract, and within the protection of the "Constitution of the United States, and that its obligation should be "enforced, notwithstanding a contrary conclusion by the Supreme "Court of a State? It never was intended, and cannot be sustained by "any course of reasoning, that this Court should, or could with fidelity "to the Constitution of the United States, follow the construction of "the Supreme Court of a State in such a matter, when it entertained a "different opinion: and in forming its judgment in such a case, it makes "no difference in the obligation of this Court in reversing the judgment of the Supreme Court of a State upon such a contract, whether "it be one claimed to be such under the form of State legislation, or "has been made by a covenant or agreement by the agents of a State, "by its authority."

1 Bla., 443.

Again the language just cited, is quoted with approval, and adopted by this Court as part of its opinion in—

Bridge Proprietors vs. Hoboken Co., 1. Wall. 145.

Again in *Delmas vs. Insurance Co.* this Court again says—"This Court "has always zealously asserted the right, when the question before it was "the impairing of the obligation of a contract by State legislation, to "ascertain for itself whether there was a contract to be impaired. If "it were not so, the constitional provision could always be evaded by "the State courts giving such construction to the contract, or such de-

"cisions concerning its validity, as to render the power of this court of "no avail in upholding it against unconstitutional State legislation."

14. Wall. 668.

Vide also;

Eutz vs. City of Muscatine, 8 Wall. 582–584; *Olcott vs. Supervisors*, 16. Wall. 689–680; *Swift vs. Tyson*, 16. Pet 14–19.

ON THE MERITS.

I.

Before, and at the moment, when The Bank of Washington assigned the Defendant's note to the Plaintiff, in November, 1866, the Bank had the right, under the Constitution, and Coinage, and Legal-Tender laws of the U. S., to require the Defendant to pay any judgment, which it might recover against him on said note, in the lawful currency of the U. S.; and the Defendant had no right to require the Bank to receive its own bills, in payment and satisfaction of such a judgment, as a Legal-Tender, equivalent, *quoad hoc*, to gold and silver coin of the U. S.; *a fortiori*, the Plaintiff, immediately after the note was assigned to him, had the right, under the same Constitution and laws of the U. S., to require the Defendant to pay any judgment, which the Plaintiff might recover against him, on said note, in the lawful currency of the U. S.; and the Defendant had no right to require the Plaintiff to receive the bills of the Bank, in payment and satisfaction of such a judgment, as a Legal-Tender, equivalent *quoad hoc*, to gold and silver coin of the U. S.

1. The decision of the Supreme Court of N. C., in this case, of which we complain, was rested upon the direct converse of the proposition above laid down—as appears from the Opinion filed by the Chief Justice in that cause. (*Blount vs. Wildley*, 68 N. C. Rep., 2 to 10 inclusive.) Conceding that there was no express provision in the Charter of the Bank, nor in any general statute of the State, at the time when the Defendant's note was assigned to the Plaintiff, which required the Bank to receive its own bills as a legal tender equivalent to gold and silver coin, in payment of debts due to it—the position taken by the Supreme Court of N. C is—(*a.*) That a right, entirely distinct from the right of off-setting mutual, subsisting debts, and resting upon a different legal principle, exists at common law, and independently of any positive legislation, in every debtor to an incorporated bank of issue, to acquire the bills of the bank, and use them as a *legal tender*, equivalent to gold and silver coin, in satisfaction of his debt due to the bank.

It is claimed that this right does not accrue to the bank-debtor, when and after he acquires the bills of the bank, and does not grow out of that principle of *natural equity*, which, in cases of mutual subsisting indebtedness, regards *no debt* as in existence where the mutual debts are equal—and the *balance of the larger debt as the only debt due*, where the mutual debts are unequal—a principle known in the Roman law as *compensation*, and recognized and regulated in our law by statutes of *set-off* and *counter-claim*. What is claimed for the Defendant is a substantive, independent, vested right of a bank-debtor, as distinguished from all other debtors, to pay his debt to the bank with its bills, as a legal tender, equivalent *quoad hoc* to gold and silver coin. And its alleged origin is a *tacit condition*, said to be annexed *by law* to the grant of the franchise of being an incorporated bank of issue or circulation, as part of the consideration of the grant of the franchise, whereby the banking corporation agrees, and is bound to receive its own bills *as money*, in payment of debts due to it.

It is said, that this *tacit condition* operates in many ways; whenever a debt arises to, or is contracted with the bank, this implied condition enters into and becomes part of the contract, just as if it were written on a paper evidencing the debt or contract—"The bills of this bank will "be accepted in satisfaction of this debt, as equivalent to gold and silver "coin." Whenever a bill is issued by the bank, it is not simply an agreement to pay so many dollars on demand in gold and silver coin, designed to circulate as money, but there is further stamped upon it, by operation of law—"equal to so many dollars in gold in payment of debts due to "the bank;" and at every stage of a suit brought by a bank to collect its debt, even after judgment, and until the judgment is actually satisfied by payment in coin, or by sale of property, the debtor may pay the bills of the bank into Court, or tender them to the sheriff, in satisfaction of his debt, and the bank is *estopped* from deigning that they *are* gold and silver coin.

(*b.*) That this right of a bank-debtor is so potent, as to be *paramount* to the right of an assignee, for the benefit of creditors; and enables the bank-debtor—after a bank has become insolvent, and made an assignment of all its assets, including his note, to a trustee, for the benefit of its creditors, and after he has full notice of such insolvency and assignment—to purchase in the bills of the insolvent bank, and compel the trustee to accept the same, as equivalent to gold and silver coin, in satisfaction and discharge of his note.

(*c.*) That, *therefore*, the Acts of the General Assembly of N. C.—passed *after* the Defendant's note had been assigned to the Plaintiff, and *after* the Plaintiff had recovered judgment thereon, and sued out execution to collect the same, requiring the Plaintiff to receive, in payment and discharge of his said judgment, the bills of the Bank purchased by the Defendant *after* said assignment and judgment—are not repugnant to the Constitution of U. S., as implairing the obligation of the contract, which had arisen between the Plaintiff and Defendant, when said judgment was rendered: because, such legislation was only *declaratory, and in affirmance, of the right of the Defendant, already existing,* to have the bills of the bank applied in satisfaction of said judgment—and simply provided a *mode of procedure for giving effect to a subsisting right.*

(*d.*) And, that, neither the 22nd section of the Ordinance of June 23rd, 1866, nor any of the other State legislation, already hereinbefore set out, violated the provision of the Constitution of the U. S., forbidding a State to make anything but gold or silver coin, a tender in payment of debts—for the reason, that the particular judgment in question, was rendered upon a note, which was originally held by a bank of issue; and by the act of the original parties to said note, when it was made, and as a part of their original contract, the bills of the bank were made a Legal-Tender in satisfaction and discharge of the note, even after it had been assigned, and merged in a judgment in the name of the assignee—and notwithstanding, no such agreement was *expressed* upon the face of the note, it arose as a *necessary incident* thereto, since the Bank to which it was made, was a chartered bank of issue, and the Common Law tacitly annexed the condition to the grant of the Charter, that the Bank would receive its own bills in payment of debts due to it.

2. These are in substance, the essential doctrines maintained in the Opinion It is now near two hundred years since the first bank of issue known to the English Law—the Bank of England—was chartered (in 1694;) the first *bank-bills* of our system of jurisprudence were issued by it. In no other nation since that time, have so many banks of issue been incorporated—in no other nation have so many *bank-bills* been put in circulation—as in the United States of America. Nowhere else have incorporated banks so often become insolvent, and found it necessary to go into liquidation, either voluntarily, or by some process prescribed by the Legislature; nowhere else has it been so important for bank-debtors to ascertain and assert their *vested right* to pay their debts to the official liquidator in the depreciated bills of the bank, as a legal tender, and in no other country has the opportunity for asserting this right, if it exists, so frequently recurred. During this period text-books of the law on banks and banking, on corporations public and private, on the character and nature of bank-bills, have been written by the sages of the law; and careful digests of all the decisions have been preserved and prepared, bringing the legal history of these matters down to the present day; yet, I venture the assertion, that nowhere within this immense field of legal literature, can be found the slightest trace of any of these doctrines, now for the first time promulgated by the Supreme Court of North Carolina. No *authority* is cited by the Court for the principal position enunciated, nor for any of the assumed principles of law brought to its support, and no *reason* is given to account for the existence of the implied condition, which is said to be annexed by the law to the grant of

the franchise of being a bank of issue, and on which the whole superstructure of the *opinion* rests, except, "that the object of incorporating "a bank of issue is to furnish a *'currency.'*" It is true, there is a faint vouching of *Lord Coke* as authority, as thus: "and as a consideration for "the grant of the franchise or exclusive privilege, the law *'tacite'* an"nexed the condition, (using the words of Lord Coke), *that the bank "would receive its own bills in payment of debts due it ;*" but no reference is given to paragraph, page, or subject, and the Court can hardly have fallen into the anacronism of citing *Lord Coke* as authority for the law arising out of the incorporation of banks of issue, and the character and nature of bank bills—both, financial inventions unknown to the English Law, until nearly a century after *Coke's* time. The illustrious lawyer is rather to be held responsible *only* for the correctness of the Latinity of "*tacite.*" It does not appear, nor does the learned Chief Justice assert, that the doctrines announced in the *opinion* are the peculiar law of North Carolina, and they certainly are not the law anywhere else. Indeed the Court says, the decisions in the other States are to the contrary of their views, but Courts of those States, not recognising these doctrines, have so fallen into "*obscurity and confusion.*" Under these circumstances, I trust we shall be pardoned, for questioning the existence of such extraordinary rights for bank debtors, which, whether they be just or unjust, have at least the merit of originality, for they are undoubtedly without precedent in the courts either of England or America.

3. The universal current of the authorities, is to the effect, that bank-bills are not money; that is to say, that they are not Legal Tender. That no State even has the power to render them such, by any method of legislative enactment. That though they may be made so, as towards the bank itself which issued them, it must be done by express statuary provision, for in the absence of legislation, there is no rule of the common law, which enables a debtor to a bank to discharge himself by an offer of the amount in the bills of the bank.

Morse on Banks and Banking, 397–398.

(*a.*) It is certain the General Assembly of N. C., has never held that, independently of express legislation, a bank debtor has a vested right to compel the bank to accept its own bills as a Legal-Tender; the latest charters of the two largest banks of the State—Bank of Cape Fear and Bank of North Carolina—contain express provisions requiring these banks to accept their own bills in payment of debts due to them; and no similar provision is to be found in the charter of The Bank of Washington. *Priv. Laws of N. C.*, 1854–'55, ch. 77, sec. 17; *Private Laws of N. C.*, 1858–'59, ch. 67, sec. 45; *Laws of N. C.*, 1850–'51, ch. 8. So all the legislation since the war, beginning with the Act of 10th of March, 1866, and ending with the Act of 4th March, 1871, already set out in the

Statement of Facts, in this *Brief*, presupposes that so such right existed before this legislation. *Laws of N. C.*, 1866, ch. 17, sec. 16; *Ordinances of* 1866, ch. 19, sec. 22; *Laws of N. C.*, 1868, ch. 47; *Laws of N. C.*, 1868-'9, ch. 77; *Laws of N. C.*, 1869-'70, ch. 4; *Laws of N. C.*, 1870-'71, ch. 113.

(*b.*) In the very decisions of the Supreme Court of N. C., cited in their Opinion in *Blount vs. Windley*, that Court defends the legislation just referred to, against the charge of unconstitutionality, (in so far forth as it embraces debts yet due the banks themselves), not on the ground of a *vested right*, in the bank-debtor, to pay in the bills of the bank as a *Legal Tender*, but as being, in effect, only a *regulation of the right of off-setting, in a case of mutual indebtedness* *Bank of Charlotte vs. Hart*, 67 N, C. Rep., 265-266; *Exchange Bank vs. Tiddy*, 67 N. C. Rep., 173-174. The same view precisely is taken of similar legislation in Maryland, by this Court, in—*United States vs. Robertson*, 5 Pet., 641-659; to the same effect is the decision of this Court, in—*Planters Bank vs. Sharp*, 6 How., 301-329.

So all the authorities collected and commented on, in the text books hereafter cited,—wherein it is held, that neither a debtor in general nor a bank debtor, can pay his debt in the hands of a general assignee of an insolvent for the equal benefit of creditors, whether the assignment be, by act of law, or by the act of the insolvent, with the negotiable notes, or bank-bills of the insolvent, acquired by the debtor *after* the assignment and notice thereof—rest this conclusion upon the doctrine that a bank-bill is not *money;* that a bank debtor has no *vested right* to pay his debt with the bills of the bank as a *Legal-Tender* equivalent to gold and silver coin; that a *bank-bill*, even as against the bank, is but evidence of a debt due by it to the holder, and the only reason why a bank debtor can, under any circumstances, ever pay his debt with the bills of the bank is—not because they are *money quoad hoc;* not because it was *part of his original contract* of indebtedness that he should have that privilege; not because a *condition in law* annexed to the grant of the bank charter incorporated this right into his contract of indebtedness—but because, if he acquires the bills of the bank at a time when the bank yet holds his debt, and before the right or liens of any third parties have attached thereto, an ordinary case of *mutual indebtedness* has arisen between the bank and himself, and in natural equity, as well as by the express provisions of most of the statutes regulating off-sets, one *debt* may be set against the *other*. This bank-debtor's right of set-off is no part of his original contract with the bank; after his debt was contracted it might never have accrued to him at all; it did not, in fact, accrue to him until he became the creditor of the bank by becoming a bill-holder. If, before his right against the bank accrued, the rights of third parties had attached to his debt, upon what principles of law or equity shall their rights be postponed to his?

Waterman on Set-Off, &c., 190–193, 218–219; *Morse on Banks, &c.*, 400 *et seq.;* 2 *Smith's Leading Cases.* (6th Am. Edt'n); *Rose vs. Hart*, Am. Notes 367–373; *Eden on Bankrupt Law* 201.

(*c.*) Yet the Supreme Court of N. C., in spite of all this weight of authority, hold, in this case: that the bank debtor's right to pay with the bills of the bank is not the right to set-off mutual subsisting debts, but is a *substantive independent vested right, secured to him by contract when he became a bank-debtor, to pay in the bills of the bank as a legal tender equivalent to gold and silver coin ;* and the Court goes out of its way to find an origin for this contract, in a *tacit condition*, said to be annexed by law to the grant of the franchise of being a bank of issue, which condition has nowhere else made its appearance in the annals of the law: and declares, *quoad hoc and as between the bank-debtor and the bank*, that bank-bills are money, and the Bank is *estopped* from denying to them this character; and that even a *bona fide* assignee of a bank for the benefit of creditors, takes subject to a similar *estoppel*

There are many authorities to the contrary on this exact point, and one, at least, in the Supreme Court of N. C., which if it is to stand unreversed, as I think, cuts up the whole argument and *opinion* in this case by the roots.

In *Parsons'* recent work on "*Notes and Bills,*" it is laid down in the text (Vol. 2, p. 91,) that: "*Bank-notes are not, generally, so far cash or a* "*legal tender, that they may be brought into court either in payment or sat*-"*isfaction of a judgment and execution obtained by the bank which issued* "*them*," and the author appends a long note, citing the authorities, wherein he adds: "This is allowed *by statute* in some States. *Union* "*Bank vs. Ellicott*, 6 *Gill & J.* 363."

In *Hallowell and Augusta Bank vs. Howard*, (13 *Mass. R*, p. 235), the suit was brought on a promissory note due to the plaintiff from the defendant, who moved for leave to pay into court the amount of the note in the bills of the bank. The bills were much depreciated in value. The Court said: "*Nothing is a lawful tender but gold and silver. To* "*permit the defendant thus to set off* THESE PROMISSORY NOTES *would be al*-"*lowing cross demands to be set off in a like manner in every case.* THESE "NOTES ARE NOTHING MORE THAN EVIDENCE OF A RIGHT OF ACTION. * "* * * *The only course in such a case would be to obtain a judgment on* "*the notes and set-off such judgment against plaintiff's judgment.*"

In *Suffolk Bank vs. Lincoln Bank*, (3 *Mason's R.*, p. 1,) *Story, J.*, delivering the opinion of the Court, in an action of *assumpsit* brought by the former bank against the latter, for its failure to pay about $3,000 of its bills with specie, says: "It is said in the first place, that the Cashier "(of the Lincoln Bank,) offered to pay the amount in *Boston* bills, or by "a draft on *Boston*. But this constitutes no legal excuse. Every bank "is bound to pay *specie* for its bills, and nothing else is a good tender. "Every other arrangement is a matter of courtesy and not of right. THE "SUFFOLK BANK WAS NOT BOUND EVEN TO HAVE RECEIVED ITS OWN "BILLS IN PAYMENT, *if such bills to the full amount had been* (and they "were not) *offered.* It might have been unkind and harsh treatment; "but still *the law does not compel the Suffolk bank to receive its own bills in* "*payment* of bills which it holds of another bank, at least, not under cir-"cumstances like the present."

So in *Grant on Banking*, that author, after stating the circumstances under which bank-notes are in law considered as money, says, (at p. 405): "Still it has been said, a banker stands in no different position "from other persons as to his own notes. If he sues, for instance, for "goods sold, the defendant could not support a plea of *tender*, by show-"ing he had offered the amount in the banker's own notes; *he must have* "*recourse to his set off in respect of the notes.*"

So in *Foster vs. Wilson*, (12 *Mees. & Wels.*, p. 191,) the action was *assumpsit* by the plaintiffs, as assignees in bankruptcy of a banking co-partnership, known as the "*Tweed Bank*," for money lent the defendants before the bankruptcy, the defendants pleaded "*set-off*," and relied upon certain *bank-bills* issued by the bankrupts, payable to *bearer on demand*, of which they became the bearers, *before the date of the fiat, without notice of any act of bankruptcy.* The decision turned upon the question whether the defendants were the *owners* of the bank-bills, or held them as bare *agents* for collection; but in the course of the argument, *Martin*, of counsel for the defendants, said, "Unless a party "has notice of an act of bankruptcy, the title of the assignee accrues "only from the issuing of the fiat, *and they are bound by all the equities* "*of the bankrupt, and stand in the same situation as he would have stood*, "except as to any case of fraudulent preference. * * * * * * * "*The bankers, by sending their notes into the world, profess to treat them as* "*of full value, like so many sovereigns, and the assignees cannot consider* "*them in any other light.* * * * * *They had been treated by the bank-*"*rupts as of the value of so much money, and the assignees, being placed in* "*the same situation as the bankrupts, cannot say that they are not so.*" But here *Parke, B.*, interrupted the argument and said: "*Suppose the bank-*"*rupts had refused to receive their own notes as payment for goods sold, they* "*would not be* ESTOPPED *from doing so. If they were to do so, and after-*"*wards brought an action for the price of the goods, the defendants could* "*not plead a* TENDER, *but must be compelled to rely on the* SET-OFF. A "BANKER STANDS IN NO DIFFERENT SITUATION FROM AN ORDINARY PER-"SON, WITH REGARD TO HIS OWN NOTES." Here *Martin*, of counsel interposed and said:—"*If a man has for his own benefit represented that* "*such notes are of a particular value, he cannot afterwards be allowed to say* "*they are not so.*" But *Parke, B.*, replied: "ALL HE SAYS IS, THAT HE "PROMISES TO PAY SUCH A SUM ON DEMAND." Later in the argument, the same Judge, speaking of this part of the defendant's argument, says: "*The argument was that they* (the bank-notes) *were treated* AS CASH, *but I* "*think that argument fails.*" 12 *Mees. & Wells*, pp. 198, 199, 201 and 202.

The decision in *The Bank of the State vs. The Bank of Cape Fear*, (13 Ired., p. 75), must be reversed and overruled, if the reasoning in the *Opinion* under discussion is to be sustained. The facts of that case were as follows: The *General Assembly*, at their session 1850-51, passed a statute entitled: "*An Act in relation to exchanges of notes between the several banks of the State*," (Laws of N. C., 1850-51. ch. 12, ratified Jan. 28th, 1851,)—the principal provision of which is, that when a bank or its branch presents for payment a note of another bank, the latter may pay its note with the note or notes of the former, without regard to the place where the same may be payable. After this enactment an action of *assumpsit* was brought by the Bank of the State against the Bank of Cape Fear on a bank note of the Bank of Cape Fear for one hundred dollars, dated October 1st, 1844, and payable to P. Rand or bearer, on demand, at its branch bank at Raleigh: the pleas were *non assumpsit* and *set off*, and a case agreed was submitted to the Court to the following effect: The note belonged to the Bank of the State at Raleigh, and the cashier, through a notary public, presented it at the banking-house of the Raleigh branch of the Bank of Cape Fear, on the 21st of March, 1851, and demanded payment. The cashier of the Bank of Cape Fear then tendered in payment two bank-notes for fifty dollars each, issued by the Bank of the State and payable to the bearer on demand, the one at its branch bank at Milton and the other at its branch bank at Wilmington, and refused to make payment in any other way. The plaintiff's agent refused to accept payment in that mode, and the suit was instituted.

It was admitted that the case before the Court was within the Act, and the legal question was as to its validity.

The Supreme Court of North Carolina held, *nem. con.*, that the Act "was *plainly contrary to the Constitution of the United States, and there*-"*fore inoperative*," because it was "*incompatible with those two provisions* "*in the Constitution which restrain a State from making anything but gold* "*and silver coin a tender in payment of debts, and from passing any law* "*impairing the obligation of contracts.*" There is no suggestion that the Act was barely in *affirmance* of a common law right which all bank-debtors had before its enactment: there is no hint of a *vested right* which accrued to the defendant as soon as it became the debtor of *The Bank of the State*, to pay its debt with the bills of that bank as a *legal tender* equivalent to gold and silver coin; there is no reference to any *condition* "*tacite*" annexed to the grant of its franchise, to *The Bank of the State*, and forming part of the consideration for that grant, whereby the said bank agreed and was bound to receive its own bills in payment of debts due to it, as equivalent to so much gold and silver coin; nothing is said of a contract which arose between *The Bank of the State* and *The Bank of Cape Fear*, so soon as the latter bank became the debtor of the former, and which was stamped by the law on the face of the Cape Fear bank bill for one hundred dollars, whereby *The State Bank* said: "The bill of *this* Bank will be received in payment of this note as equivalent to gold and silver coin;" the idea that *The State Bank* was *estopped* from denying that its notes, payable to bearer on demand, *issued with the intent that they should circulate as money*, *were* money, fell from no one of the judges.

The Judges were unanimous: there is no dissent; the opinion is elaborate; and *Ruffin, Ch. J.*, speaking for the Court, in the course of that opinion says: "This statute cannot be valid, inasmuch as it essentially "changes the obligation of the notes issued by the plaintiff, by requiring them to be taken up, in effect paid, at a different time and place "from those at which they are payable, according to their tenor and "their legal effect when they were issued; which may be, and in most "instances must be to the prejudice of the plaintiff. Such modes of "payment might, doubtless, be required in the charter, and it would "then be at the election of the citizens to accept it or not * * * * "But without a clause of that kind in the charter, the Legislature cannot give to the notes of a bank a different effect from that legally "arising from their terms when made, so as to work a prejudice to the "bank. *The plaintiff therefore was not bound to take the notes of its "branches in payment of the note held by it*, BECAUSE THESE NOTES WERE "NOT THEN AND THERE DUE, AND BECAUSE IF THEY HAD BEEN, THEY "WERE NOT A CONSTITUTIONAL TENDER. *If they had then, or at any "time before this action was brought, been presented at the places at which "they were payable, and payment could not be got*, THEY WOULD HAVE BEEN "AVAILABLE AS A SET OFF. But that was not done, and the case turns "merely on the tender of the notes, under the Act of 1850-51, at the "defendant's banking-house, without their having been presented at "*Milton* or *Wilmington.* The Act thus violates the contracts, constituted between these parties by their respective notes, both in their "letter and spirit, and is therefore unconstitutional." 13 *Ired., R.*, pp. 81, 82.

If there be any meaning in language, this case decides that bank-bills are not a legal tender in payment of debts due the bank which issued them; that the law imposes no obligation on a bank of issue incorporated under an Act of the General Assembly, by reason of a tacit condition annexed to the grant of its franchise, to accept its own bills in payment and satisfaction of debts due to it, as equivalent to gold and silver coin; that it is only when this obligation is imposed upon a bank by the express terms of its charter, that it exists; that a bank-debtor has no vested right to pay his debt to the bank with its own bills, as a legal tender equivalent to gold and silver coin; that a bank is not estopped from denying that its bills are money, except under such circumstances in each particular case as would estop any other person from denying that they are money; that bank bills, in the hands of a bank-debtor, can only avail to defeat the collection of his debt to the bank, by way of set-off; that they cannot be made available, even as a set off, until after presentment for payment at the banking house, where by their tenor they are demandable and payable; and that a State statute, enacted after a bank-bill is issued, requiring the bank to receive at all times and places, its own bills, no matter where payable, as specie, in payment and satisfaction of debts due to it, is repugnant to the Constitution of the United States, because it requires the bank to pay the sums specified in the several bills, which by the tenor of said bills, when the contracts were made, were only to be paid in gold and silver coin, after demand, and at the banking houses where they were demandable and payable, with a different medium, before demand, and at any place wheresoever, "from China to Peru."

It is true, in *Bank of the State v. Bank of Cape Fear*, the particular bills tendered in payment by the debtor, were not demandable and payable at the banking-house of that branch or agency of the bank which held the debt; were not payable "on demand" generally; and were in express terms, demandable and payable at the banking-houses of other branches or agencies of the bank. But that is a distinction without a difference in the application of the case to the point under discussion. How can that diversity, if it be one, enure to reconcile the decision with the doctrine announced and the legal positions taken in the *opinion* we are examining? *Ch. J. Ruffin*, says: "*If the bills had been then and there* "*due, they were not a constitutional tender,*" and, according to North Carolina law, even if they were payable *on demand generally*, without specifying any particular place for payment, *they were not due and a cause of action* until demand and refusal. (*Crawford vs Bank of Wilmington*, Phil., p. 136). In which respect prommissory notes payable to bearer on demand, *issued by a bank and intended to circulate a smoney*, perhaps differ from ordinary prommissory notes payable on demand. (*Rev. Stats.*, ch. 13, sec. 5; *Rev. Code*, ch. 13, sec. 5; *Ormond vs. Moye*, 11 Ired., p. 564.) Moreover, the ground upon which the Supreme Court, in their opinion in our case, rest the vested right of the defendant to pay his note in bank-bills, as a legal tender equivalent to gold and silver coin, is a tacit condition annexed to the grant of the bank's charter, whereby it is bound to treat *every* bill issued by it and intended to circulate as money, *wherever payable, and whenever and wherever tendered in payment of a debt due it, as money, as legal tender, as equivalent to gold and silver coin* According to the *opinion*, if a North Carolina bank, through an agent in Pekin, *there* demands payment of a debt due to it by a citizen of Pekin, it, or rather its agent for it, is bound *then and there* to receive its own bills, payable and demandable at its banking-houses in North Carolina, as a legal tender in payment and satisfaction of the debt. In other words, the bank is bound to pay in Pekin, before demand, and with a debt due to it, a sum, which, by its bills, it only promised to pay at its banking-houses in North Carolina, after demand *there*, and in gold and silver coin of the United States.

We are now prepared to answer the inquiry so impressively propounded by the Supreme Court early in their *Opinion*, viz: "Did the maker of the "note have a right to tender the bills of the bank in payment as equiva- "lent to gold and silver coin, or has the bank a right to compel payment "in gold and silver, and to refuse to accept *its own bills* in payment of debts due to it?"

The maker of the note *had no right to tender* its bills in *payment:* as equivalent to money—and the bank *had a right* to require payment in gold and silver, and to refuse its own bills as *payment:* and for this very simple reason that the *bank-bills are not a constitutional tender:* and the law will not change the bank's bills—its promises to pay *in gold and silver coin, at its banking house or houses, after demand at such place or places*—into promises to pay, *with a debt due it by its bill-holder, at any and every place, and before demand at its banking house or houses;* in other words, the law will not compel a bank to pay its bills, with a different medium, and at a different time and place, from those contemplated by the parties, and expressed upon the face of the bills, when they were issued. If it so happened that the bank-bills were tendered in payment at the very office of the bank where they were demandable and payable, or, if in form, they were payable *in demand generally*, without specifying any place (in which event they would be demandable and payable at any and every office of the bank, everywhere) and were tendered in payment at any office of the bank—and were under such circumstances refused by the bank—the law would probably regard such tender in payment as equivalent to demand and refusal—the bills would become *due and a cause of action in the hands of the holder*—and the bank-debtor might safely refuse to make payment in any other way; and when sued for his debt, he might rely upon *the bank bills which he had tendered in payment* as a *set off*, as one of the two *mutual debts, subsisting* between the plaintiff and defendant when the suit was brought.

(*d.*) For many purposes *current* bank-bills—not bank-bills of a suspended bank, which have ceased to be current—are regarded as money; yet they are not a *Legal-Tender*, and cannot be brought into court as *cash*. A judgment debtor of a bank, cannot bring its bills into court in discharge of the judgment. *Coaxe vs. State Bank*, 3 Halst. 172; *Young vs. Adams*, 6 Mass. 189; *Moody vs. Mahurin*, 4 New Hamp., 296; *Havener vs. Kerr*, 1 South. 59; *Sinclair vs. Piercy*, 5 J. J. Marsh. 64; *Goodenor vs. Duffied*, Wright 458; *Atkins vs. Blake*, 2 J. J. Marsh, 40.

4. But the *foundation* upon which the whole edifice of the *opinion* rests, is this proposition therein enunciated. "The object of incorporating the "bank was to furnish a '*currency*,' and as a condition for the grant of "the franchise or exclusive privilege, the law '*tacite*' annexed the con-"dition (using the language of Lord Coke), *that the bank would receive its "own bills in payment of debts due to it*." If this proposition be unsound the whole *opinion* must give away, the whole superstructure must totter to its fall, for it is built upon it. As has already been shown, no authority is cited to support it. It is certainly not in its favor, that no text-book of the law and no decision of any Court can be pointed to, which recognizes the existence of the *tacit condition* relied upon in the *Opinion*. It is difficult to argue against a naked assertion, unsupported by reasons or authority; and usually a flat contradiction is a sufficient refutation. It is next to impossible to produce *negative* authorities, denying the existence of any such *tacit condition*, annexed by law, to the grant of an incorporation to transact the business of banking—for probably, it is for the first time asserted. in a Court of law, in the opinion in this case. But the authorities already cited are conclusive, that whether there be any such tacit condition annexed, by law, to the grant of a bank-charter or not, it does not enure to give bank-debtors a vested right to pay their debt to the bank with its bills, for the decisions quoted expressly deny that a bank-debtor has any such vested right. If this vested right of a bank-debtor is a *necessary* sequence of the tacit condition said to be annexed to the grant of a bank-charter, as is argued in the *opinion*, then these authorities would seem to disprove the existence of any such tacit condition.

It is familiar learning, that it is a tacit condition of every grant of incorporation, that the grantees shall act up to the end or design for which they are incorporated; and hence through *neglect or abuse of its franchises*, a corporation may forfeit its charter, as for condition broken (An. & Am. on Corp., sec. 774). And it is also familiar learning, that *every* grant of a franchise or exclusive privilege by the State, has annexed to it by law the tacit condition that the grantee *shall use and shall not abuse* the privilege, on pain of forfeiture. I know of no other conditions which the law "*tacite*" annexes to the grant of a franchise or exclusive privilege. The State, by its charter, granted to the Bank of Washington the franchise of issuing promissory notes payable to bearer on demand *designed to circulate as money*, a privilege withheld from the people of the State generally by statutory enactment. (Rev. Code, ch. 36, secs. 5 and 6; Rev. Stats, ch. 34, sec. 90; Act of 1816, ch. 900, sec 7.) The only *tacit* condition annexed by law in respect to the grant of this franchise was, as if it had been written at the foot of the bank's charter, "the condition of "this grant is such that if the Bank of Washington shall *fail to issue "bank-bills* intended to circulate as money, as provided in this charter, "or *shall issue them in disregard to and violation of* the regulations, limi-

"tations and restrictions by *this charter* in that behalf prescribed, then "this grant shall be void and of none effect, and the franchises of said "bank shall be forfeited to the State." It is incumbent upon those who allege, that a tacit condition to receive its own bills in payment of debts due to it, was by law imposed upon the Bank of Washington by reason of the franchise granted to it to issue bank-bills intended to circulate as the representative of coined money—to show that its refusal so to do is either a *nonuser* or a *misuser* of that franchise: and this I think will hardly be attempted: its refusal to receive such bills in payment of debts due to it, is certainly not a *neglect* to issue them, and it is quite as evident, it is not *an issuing of the bills in disregard and violation of any of the regulations, limitations, and restrictions of the charter.* The tacit condition spoken of in the *opinion* is not then annexed to the grant of the bank's charter, because it is a corporation, not because it is a corporation having a franchise to issue bills intended to circulate as a substitute for money. From what other source can it be derived?

5. But supposing the doctrine of the tacit condition to be established and the effect of it upon every note made to a bank to be what is held in the *Opinion*, viz: that it writes upon the face of every such note, "*the* "*bills of the bank will be received in payment of this note as equivalent to gold* "*and silver coin.*" Does it follow that when the bank-debtor refuses and neglects to pay in money or to take advantage of this privilege to pay in the bills of the bank, and the bank is compelled to sue to get anything, and the Court gives it a judgment against the bank-debtor for so much money, the debtor can then purchase up the depreciated bills of the bank and pay off the judgment, with them? Is the defendant in such judgment, entitled of right *to allege such contract upon the part of the bank*, at that stage of the proceedings?

If a creditor agrees with his debtor that he will accept in payment of his debt, wheat, corn, tobacco, cotton, or bank-notes, or his own notes, and his debtor for a course of fifteen years after his note is due, refuses or neglects to tender payment in such articles, and is afterwards sued upon his note, and even after suit brought makes no such tender, or pleads his readiness to pay in such articles, and judgment is obtained against him on his note for money due; can he afterwards ask a court to allow him to tender payment in anything else than money, or have a rule on the plaintiff to compel him to accept notes on a broken bank, or other specific articles in payment of an execution issued on the judgment? Again, if the contract sued upon is payable in specific articles, and no tender of them is made before suit is brought, or plea that the defendant is ready and willing to pay according to contract, and the court gives judgment against the defendant for a certain sum of money, as damages for his breach of his contract, can he afterwards compel the sheriff or the plaintiff to accept specific articles in satisfaction of a judgment and execution for money? And again, if a defendant hold notes made by the plaintiff, he may plead them as a set-off, and obtain judgment in his favor. But if he enter no such plea, or demand no such set-off, and judgment is entered against him for the money due, can he purchase the plaintiff's notes after judgment, and ask the court to compel the plaintiff to accept them in payment? I am not now inquiring whether the *legislature* may enact a law after judgment to require the plaintiff to accept *his own notes*, even when purchased by the defendant after judgment, in satisfaction thereof. I admit such legislative power, but the Supreme Court holds that a bank-debtor has such a right against the bank independently of any such express legislation, when he offers the bank's own bills in payment, and derives the right, in part at least, from the assumption that the original contract upon which the judgment was rendered was for payment in such bank-bills.

But when a suit is brought upon a contract, it becomes merged in the judgment; if the defendant claims a right to pay in anything else than money, he must plead it, and set it up on the trial; for the Court in an action for money can give judgment only for the payment of money. If after trial, verdict and judgment, the defendant on motion, could raise a new question as to set-off, tender, or a right to satisfy the debt in some other way than payment of money, the judgment of a Court instead of being the end of controversy, would be but the beginning of litigation. The Supreme Court hold that an alleged contract of a bank, to receive payment of a debt in its own bills, entered into at the time when the debt was contracted, may at common law, be set up as a defence against the debt, after it is merged in a judgment for money, and thus the defence be tried after the judgment.

If Courts of justice have such a power, it would seem that they never exercise it, for the books of reports furnish no precedent for such a proceeding. Certainly the assumption that the contract with the bank has incorporated into it by act of law, the bank's agreement to receive payment of its debts in its own bills as equivalent to gold and silver coin, will not help the defendant in his claim to pay the *judgment* in which the contract is merged, with the bills of the bank; for a contract to pay in bank-bills is, by the universal current of authorities, construed to be, either a contract to pay in *money*, or a contract to pay the *value* of the bank-bills, at the time when by agreement they were to be delivered– if the bank-bills are not paid or tendered at the day.

Lackey vs. Miller, Phil., 26; *Fort vs. Bank of Cape Fear*, Phil., 417; *Smith vs. Goddard*, 1 Ham., 178; *Morris vs. Edwards*, 1 Ham., 189; *Edwards vs. Morris*, 1 Ham., 524; *Hustan vs. Noble*, 4 J. J. March, 136; *Keith vs. Jones*, 9 Johns., 120.

But say the Supreme Court of N. C., in their *Opinion* in this case—"It can make no difference whether the bills of the bank, which are as "against the bank to be treated as equivalent to gold and silver coin, "are tendered before or after judgment. Surely a debtor can discharge "his debt by a tender of gold and silver coin, at any time before the "sheriff sells under execution. As against the bank the bills of the "bank are to be treated as equivalent to gold and silver coin." Now it is true, if a Defendant brings the amount of the judgment against him into court, in gold and silver coin—in lawful money—the *Court* may order satisfaction to be entered on the record, and execution to be stayed; for the *Court will judicially recognize the current coins of the country*, whether established by statute, or existing immemorially. (1 *Greenlf. on Ev., sec.* 6 *and notes.*) So if A have a *judgment* against B, and B have a judgment against A, a court of law, in which either of said judgments was rendered, may, upon the application of the party who has the other judgment, in the exercise of a sound equitable discretion, set off one judgment against the other; but this is not as a matter of *right* to either party, but only in the exercise of the equitable discretion of the Court, for to a judgment ripe for execution, there can be but one answer, *to wit: payment pure and simple.* (Agnew, J., in *Thorp vs. Wegefarth*, 56 *Penn. St. R.*, 82) Yet the Court can only set off a judgment against a judgment; to a judgment there can be no set off of a debt not in judgment. Therefore, where the party moving had obtained a *verdict*, which he sought to set off against the judgment in favor of his adversary, the motion was denied on the sole ground, that the final judgment had not been obtained. (*Galrick vs. Jones*, 2 *Dowl. Pr., Cas.* 157; *Johnson vs. Lakeman*, *Ib.*, 646; *Smith vs. Briggs*, 9 *Barb.*, 252.) Again, during the pendency of a suit, by A against B, A made a promissory note in favor of B, and at the same time gave B a written stipulation, that the note should be applied on the judgment, if the suit terminated in A's favor. A recovered his judgment; B applied to the Court to set off the note against the judgment; the Court held, *that it had not the power*, to set off the note against the judgment. (*Bagg vs. Jefferson*, 10 *Wend*, 615.) Again, the subject matter of the set off must be *conclusive* upon the party who has the judgment against which it is used, and must have passed the ordeal of a *judicial determination* in a case where the Court had acquired jurisdiction of that party either *by his appearance, or by personal service of process upon him*—(*Willes, J., in Harris vs. Palmer*, 5 *Barb.*, 105.) And a set off of a judgment obtained upon an *attachment where the Defendant did not appear* was denied—because a judgment rendered upon an attachment, without being contested, is but *prima facie* evidence of a debt and is impeachable in an action upon it, (6 Cowen, 598); though now in N. Y. such a judgment would probably be set off, if the attachment were personally served on the Defendant. (*Sess. Laws N. Y. of* 1831, ch. 300, *secs.* 36, 37, 38, 39; *Harris vs. Palmer, supra.*)

Now, why is it that a court *may* set off one judgment against another—and *has no power* to set off, and will not set off, against a valid judgment any other debt than another *conclusive judgment rendered after service of process* and *regular judicial proceedings?* It is because as in the case of coin or money, the *courts judicially recognize a debt proved by a record*—they can take *judicial cognizance* of an existing judgment; but they *cannot take judicial cognizance* of either written or unwritten evidence of an existing cause of action—and cannot presume, without *due process* of *law* and the *intervention* of a jury, to pronounce judgment against a party upon such evidence, and then divest him of his property—his judgment—and vest it in the party offering the counterclaim.

But, when a bank-debtor against whom a judgment has been rendered in favor of the bank, brings what purports to be the bills of the bank into court, and claims a *right* to satisfy, or compensate, or set off the judgment against him, with such bills, how can the *Court judicially recognize* whether they are or are not the bills of the bank—and which of the bills are, and which are not the *genuine bills* of the bank? Is it pretended that the courts *judicially recognize* the genuine bills of every incorporated bank of issue? If it is not—the bank against which the bills are offered in evidence, has the right to come into court only under *due process of law*—and being in court, if it denies that the bills are genuine, or that the present holder is the owner thereof, or sets up any other valid defence against their payment—it has the *right* to have the *facts* in issue tried by a *jury*—and only to be deprived of its *judgment* against the bill-holder, after judgment against it on the bills, entered after due process of law. The Supreme Court of N. C. says, that, as against the bank, its bills are equivalent to gold and silver coin. It is presumed this position is taken only with respect to its *genuine* bills. When bank-bills, purporting to be the bills of a *particular bank*, are brought into court, and a right claimed to use them in satisfaction of a subsisting judgment against the holder, a preliminary question as to whether they are the bills—and the genuine bills of that bank, must always arise, of which the court cannot take judicial cognizance, and before which is decided the alleged estoppel upon the bank, to deny to its bills the character of gold and silver coin, cannot arise. And even assuming the genuineness of the bills to be admitted, they still constitute only *evidence of an existing cause of action* against the bank, to which the bank has a right to make its *defence in the ordinary way by due course of law*, and on account of the existence of which the Court, acting summarily, cannot presume to deprive it of its property, and apply that property to the satisfaction thereof. The absurdity of the position contended for, is made still more manifest, when we consider a case where a bill-holder, against whom there is no judgment, brings his bills into court and asks the Court summarily, and without due process of law, to recognize their binding character upon the bank, and to condemn its property, or to apply money belonging to the bank then in court, or a judgment against a stranger in favor of the bank, to the satisfaction of the bills. If the

Court yielded to his importunity, every lawyer will recognize, that it would be in the exercise of a most monstrous usurpation, and in violation of every principle, imbedded in the Common Law, and in our Federal and State Constitutions, to secure private rights of property against unjust and unreasonable invasions. Nor does it alter the case, that the person against whom this usurpation, by the judiciary, of unusual and unlawful power is invoked, is an insolvent bank of issue, which has recovered a judgment against one of its debtors, against which he had no defence when the judgment was rendered, but who has since become its creditor by purchasing its depreciated bills. (*Riddick vs. Moore*, 65 N. C. Rep., 382). This is what was meant by the Supreme Court of Mass., in *Hollowell and Augusta Bank vs. Howard*, (13 Mass., 235,) cited *supra*, when they say, to a bank-debtor who brought into court the bills of the bank, which were much depreciated in value, and claimed the right to satisfy a subsisting judgment against him therewith—"THESE NOTES "ARE NOTHING MORE THAN EVIDENCE OF A RIGHT OF ACTION * * * *. "THE ONLY COURSE IN SUCH A CASE WOULD BE TO OBTAIN A JUDGMENT ON "THE NOTES, AND SET OFF SUCH JUDGMENT AGAINST THE PLAINTIFF'S "JUDGMENT." Where bank-bills are pleaded, or given in evidence, under the general issue, as a set off before judgment, the bank has an opportunity to defend itself in the ordinary way against their payment; where they are tendered in payment, whether before or after judgment, the bank has no such opportunity, if its bills are to be regarded as against it, as equivalent to gold and silver coin; for even a plea of tender before judgment must be accompanied by a payment of what was tendered as money into court, which profert, alleged in the plea, is not traversable, but must be decided by the court. If tendered before judgment, by some new rule of pleading, the courts might perhaps allow an issue to be made upon their validity, or ownership, or that other defence against their payment might be set up by replication of the bank; but to allow such pleading and trial by jury after judgment, upon an application made to the Court to satisfy the judgment with bank-bills, would certainly be an anomalous proceeding, and the introduction of a novelty hitherto unknown to the courts. I cannot think that this Court will concur with the Supreme Court of N. C. in the opinion, that, "*It can make no difference whether the bills of the bank,* * * * * *are tendered before or after judgment.*"

II.

Before, and at the moment, when The Bank of Washington assigned the Defendant's note to Plaintiff, in Nov., 1866, the Defendant had the right, under laws of N. C. then in force, to set off against said note in the hands of the Bank, in any suit which the Bank might bring, to enforce the collection thereof, any bills of the Bank which he THEN held; immediately after his note was assigned to the Plaintiff, he had the *same right of set off* as against the Plaintiff; but the Defendant held no bills of the Bank at the time when the assignment was made; and this right of set off did not *then* extend to give the Defendant the right, as against the Plaintiff, AFTER the insolvent Bank had assigned his note to the Plaintiff as Commissioner, for the equal benefit of its creditors, and the Plaintiff had recovered judgment thereon in his own name—to purchase up the bills of the insolvent Bank, and with them set off, or compensate, or discharge said judgment so recovered by the Plaintiff.

1. The Plaintiff is an assignee in law; the Defendant's note was assigned to him, under and by virtue of the provisions of the Act of 12th of March, 1866. In view of the legislation enacted by the General Assembly of N. C., *after* the Plaintiff recovered his judgment, it becomes important to ascertain the respective rights and duties of the Plaintiff and Defendant, each towards the other, which arose *immediately* after said assignment; and whether by reason of any right which was *then* reserved to the Defendant, he can *now* set off, or compensate, or discharge the Plaintiff's judgment, with the bills of The Bank of Washington, of which he has become the holder *since* that judgment was recovered.

(*a.*) My position is, that the Defendant cannot set off or satisfy the Plaintiff's judgment with the bills of the Bank, *now* in his hands, because his note, made to the Bank, became vested in the Plaintiff, as Commissioner for the equal benefit of all the creditors of the Bank, under the Act of 12th of March, 1866, in November of that year, (Secs. 1 and 2); by the provisions of the Act, immediately thereupon the corporate existence of the Bank ceased, and these very bills, now held by the Defendant, in the hands of the then holder, were extinguished as debts due by the Bank, and became in the then holder's hands but evidence of his claim for his *quota* of the Bank's assets in the hands of the Commissioner (Sec 8); and this claim could be prosecuted against the Commissioner in no other court, in no other manner, and within none other time, than those specified and described in the Act itself (Sec. 5); *afterwards*, with all these characteristics and qualities impressed upon the bills, they were acquired by the Defendant; his assignor could transfer to him nothing more than such assignor himself held at the time of the transfer. Moreover the Act expressly limits the Defendant's right of set-off against the Commissioner, to claims against the bank held by him at the time when his note to the bank so became vested in the Plaintiff as Commissioner (Sec. 4).

When this law was enacted in March, 1866, most, if not all, of the banks of this State had become insolvent by the event of the recent war; there was no hope of their recuperation; the financial policy of the Federal Government, and the heavy taxes imposed by that Government on these corporations, made it absolutely necessary that they should close their business, and rendered a further continuance of their corporate existence idle and useless to the people of the State; their bills had become depreciated, had ceased to circulate as currency, and were only held to offset debts due to the banks, or as any other articles of merchandise. The general scope and objects of the law were, to induce the banks to surrender their corporate existence, and to provide for an equal *pro rata* distribution of all their assets among all their creditors. *Equal justice* to all the creditors was the *main* object of the law, and *equality was equity*. But equality of what among whom? Clearly of the *assets* of the bank among the *creditors* of the bank. But in the final winding up of the business of an insolvent man or of an insolvent bank, in cases of cross indebtedness, the assets of the bank on the one hand, or the debt due by it on the other, consist only of the *balance* of the accounts. *It* is the only fund which the bank has to satisfy its creditors, on the one hand—and *it* is the only debt on which the creditor ought to expect a dividend, on the other. This law of the 12th of March, 1866, is, in all its essential features, a bankrupt-law for insolvent banking-corporations. As the right of set-off in bankruptcy and insolvency is founded in equity, it ought not to be exercised unjustly or inequitably, and no claim ought to be set-off against the Commissioner of a bank which originates or is acquired subsequent to its dissolution, unless allowed in the Act itself, and in the most explicit terms; for from the moment of dissolution the assets are held by the commissioner in trust, for equal distribution among all the creditors, and no one is entitled to take any steps to obtain a preference over others.

(*b.*) The 4th section of the Act prescribes the method for proving demands against the assets, and lays down the rule of set off between the Commissioner and persons preferring claims against him. So much thereof as fixes the rule or set off is as follows: "*In all cases in which any* "*such commissioner shall be a party, whether plaintiff or defendant, and it* "*shall appear that there has been mutual credit given by the bank and any* "*other corporation, or any person who is the opposite party, or there are mutual* "*debts between them, whether such debts be due and payable or not, or whether* "*demand has been made for the same or not, the account between the parties* "*shall be stated, and one debt shall be set-off against the other, and the bal-* "*ance of such account only shall be allowed or paid on either side respectively,* "and the costs in all cases shall be paid by either party, as the court "shall direct."

The paramount object of all construction of statutes is to ascertain the *intention* of the law-maker, *the thought* which underlies and is intended to be conveyed by the words used. This intention must be gathered from the language adopted; but such language must be read in the light afforded by a full knowledge of the subject-matter of the statute, and the circumstances which touched and surrounded it when the law was enacted, and also by other statutes in *pari materia.* So interpreting this 4th section of the Act of 12th of March, 1866, it seems unquestionable, that it was the intention of the Legislature to regulate the whole matter of off-set, in cases between a commissioner and any other person who is the opposite party, by the provisions of this section, and in such cases to allow no other counter-claims than such as are therein provided for; and it seems quite as evident, that the only counter-claims or off sets therein allowed are such *mutual* credits and *mutual* debts as existed between the bank and such other person, who is the opposite party, at the moment when the bank terminated its existence. It is absurd to say, that *mutual* credit has been given by the bank and another person, or that there are *mutual* debts between them simply because such person stood in the relation of debtor to the bank when it existed and at the moment of its dissolution, and *after* it had ceased to exist, and could therefore own nothing, and have nothing due it, and *after* such person's debt, (once due by him to the bank), had become vested in the commissioner for the equal benefit of *all* the creditors, he acquired a claim for his rateable share of the bank's assets in the hands of the commissioner, by purchasing the bills of the bank, or any other debt due by it while it lived. Such a construction would defeat the whole policy of the law. Take our case for example: At the time of the filing of the bill in Equity by the Bank, the defendant had no claim against it. Instead of having a claim, he owed it a debt to which there was no offset, a debt in which all the creditors of the bank acquired an interest immediately upon the commencement of the legal proceedings; and the Defendant now purposes to deprive the creditors of the benefit of this debt, by off-setting bills of the bank, purchased for a trifle, while the proceedings were pending. There can be no doubt that such a transaction as this is a direct fraud upon the law. If the persons who were the owners of the bills at the time of filing of the bill in Equity had continued to be so till now, *they* would be entitled only to their ratable proportion of the bank's assets; and it would seem to be a mockery of the law, that another person could, by what was termed by Lord Kenyon in a similar case (Dickens v. Evans, 6 Term R., p. 57), "an intrigue" between himself and the owners of the bills, obtain payment thereof in full; for such would be the legal effect of the transaction if the claim set up by the Defendant should be sustained. He acquired by his purchase of the bills no greater rights than his assignor had, that is, a right to a ratable proportion of the assets of the bank, on proof of his debt in the manner prescribed by the statute. The defendant must pay his debt to the commissioner, and then prove his claim in the manner prescribed by the Act, if, in his zeal to evade the law, he has not already allowed the time to elapse within which such proof was possible, and take his *pro rata* share of the assets.

2. Instances are not wanting of the construction put by the Courts upon similar provisions in statutes of a like character with that of 12th of March, 1863.

(*a.*) In *Root vs. Taylor*, an early case in New York, the question was the proper construction of the general statute of set-off of that State, which is substantially similar to our own and the English statute upon the same subject; these provide that "where either party may sue or be "sued as Executor or Administrator, and there are *mutual debts* subsist-"ing *between the testator or intestate and either party*, the one may be set "against the other," &c. In this case, to an action brought by an Administrator for a debt due his intestate, the defendant sought to set-off a demand purchased by him *after the death of the intestate*. It was not allowed. Spencer, Ch. J., in delivering the opinion of the Court, said: "My conclusion is, that this is not a case within the statute; *that the in-"testate and defendant never were indebted to each other;* and that it would "be unjust, and against the whole policy of the statute, to allow the "set-off of a debt acquired against the estate of a deceased person sub-"sequent to his death."

Root vs. Taylor, 20 Johns R., p. 137.

(*b.*) *Dickson vs. Evans* was a case in the King's Bench, on the construction of the set-off provision of one of the English bankrupt laws, 5 Geo. II., ch. 30. Sec. 28 enacted—"that if it shall appear to the Commis-"sioners that there has been mutual credit given by the bankrupt or "there are mutual debts between the bankrupt and any other person, at "any time before the bankruptcy, the Commissioners shall state the ac-"count, &c., and what shall appear to be due, &c., shall be claimed or "paid, &c." This action was by the assignees of a bankrupt on the promissory note of the defendant made to him before the bankruptcy. The defendant proposed to set off certain cash notes issued by the bankrupt before his bankruptcy, payable to *bearer*, *and offered no evidence that he was the holder at the time of the bankruptcy*. They were not allowed. Kenyon, Ch. J., delivering his opinion, said: "The Act was founded on "good sense, and it provides that the assignees shall not recover against "the debtor of a bankrupt what was due to the bankrupt on one side of "the account, without also taking into consideration the other side of "the account, and seeing on which side the balance lies. That is the "justice of the case. But it would be most unjust indeed if one person, "who happened to be indebted to another at the time of the bankruptcy "of the latter, were permitted by an intrigue between himself and a "third prson, so to change his own situation as to diminish or totally "destroy the debt due to the bankrupt, by an act *ex post facto.* In cases of "this sort the question must be considered in the same manner as if it "had arisen at the time of the bankruptcy, and cannot be varied by any "change of situation of one of the parties."

Dickson vs. Evans, 6 Term R, p. 57.

(*c*) In *Ogden vs. Cowley,* in the Supreme Court of New York, the provision of the Bankrupt law of the United States, of 4th of April 1800, Section 42, (2 U. S. Stats. at Large, p. 440), regulating cross demands between the assignee in bankruptcy and the creditors of the bankrupt, was under consideration. The plaintiffs were assignees in bankruptcy, sueing for a debt due the bankrupt; the defendant offered to set-off certain checks on a bank payable to *bearer,* issued by the bankrupt before his bankruptcy, and offered no evidence that he was the holder when the petition in bankruptcy was filed. The checks were not allowed. Kent, Ch. J., delivering the opinion of the Court, said: "The second "point is within the case of *Dickson vs. Evans* (6 Term, 57.) The decis-"ion of the K. B. in that case is founded in good sense and sound policy, "and I am disposed to adopt it. It would, as Lord *Kenyon* observes, be "unjust, if one person who happened to be indebted to another at the "time of his bankruptcy, was permitted, by any intrigue between him-"self and a third person, so to change his own situation as to diminish "or totally destroy the debt due to the bankrupt, by an act *ex post facto.* "*Such an act would be a fraud on the equality of the Bankrupt Act.*" *Ogden vs. Cowley,* 2 Johns R., p. 274.

(*d.*) In these cases, however, the courts lay some stress upon the particular phraseology of the Bankrupt Acts upon which they were respectively founded. The words used in the 5 Geo. II., ch. 30, sec. 28, and also in the Act of Congress April 4th, 1800, sec. 42, are, that an offset shall be allowed where there have been mutual debts between the bankrupt and any other person, "*at any time before the bankruptcy.*" In the Bankrupt Act of the U. S. of the 19th August, 1841, sec. 5 (5 U. S. Stats. at Large, p. 19), the provision is, that, "in all cases where there "are mutual debts, or mutual credits between the parties, the balance "only shall be deemed the true debt or claim between them, and the "residue shall be deemed adjusted by the set-off." And in *Smith vs. Brinckerhoff,* decided in the Supreme Court, and afterwards affirmed in the Court of Appeals, of New York, the same construction was put upon the Act of 1841. *Edwards, J.,* commenting upon the different phraseology adopted in the three Acts, says of the *last:* "It does not state "the time when the mutual credits must exist; but it would hardly be "a reasonable construction, to say, they might be created after the "filing of the bankrupt's petition, and at a time when he was incapaci-

"tated from entering into engagements binding upon his property." *Smith vs. Brinckerhoff*, 6 N. Y. R., 305; S. C. 8 Barb., p. 519.

(*e.*) In the decisions upon the New York statutes, regulating the winding up of the business of insolvent and dissolved moneyed corporations, it has been held that the debtor to a bank has a right, as against its receiver, to be allowed for any demand which he had against the bank *before and at the time* when it became insolvent, or its charter expired, or was forfeited, or surrendered. If, however, he has bought bills of the bank, or procured the assignment of other claims *since* that time, he cannot avail himself of them as a set-off; but must pay his debt to the receiver, and come in for his distributive share of the bank's assets, with the rest of the creditors. And the same position has been maintained, with singular unanimity, in the other States having similar laws. *Vide* the cases collected and commented on in *Waterman on Set-Off, &c.*, pp. 190 to 193; *Morse on Banks, &c.*, pp. 400 *et seq.*; 2 *Smith's Leading Cases* (Sixth Am. Edtn.) American Notes, pp 367 to 373.

3. The authorities are uniform in all analogical cases, growing out of death, insolvency, bankruptcy, dissolution of corporations and the like. The right of set-off, in cases between the assignee and the person who is the opposite party, *extends* to *mutual* debts and *mutual* credits *subsisting* between such person and the deceased, the insolvent, the bankrupt, or the corporation, *at the moment of death, insolvency, bankruptcy*, or *dissolution*, and is *confined* to such debts and credits *only*. Most of the decisions were made under the sanction of statutory enactments, similar to the provisions of the 4th section of the Act of 12th March, 1866; but the cases would have been decided in the same way had no such provision been inserted in the statutes, on the general principle, as to the first branch of the rule, that while it might seem more equitable to limit the right of recovery in all cases to the amount which would be due on a final settlement of the accounts between the plaintiff and defendant, no other course can be pursued consistently with justice, when his whole estate has finally passed from the keeping of the original owner for the equal benefit of his creditors, and the suit is brought by his assignee; and as to the second branch of the rule, that to extend this right of set-off further, to claims against the original owner acquired by his debtor after the assignment, would be to controvene the whole policy of a statute, whose object was *equality* among creditors, and to violate the equitable principle that *equality is equity*. So if the statute of 12th of March, 1866, had not by its 4th section regulated the right of set-off in cases between the commissioner and the person who is the opposite party, the same rule which is therein announced would necessarily have obtained as a corollary from the other provisions of the Act, and the general principles of natural as well as artificial equity. This case is not to be de-

termined by the technical rules of set-off at law, of the 2 Geo. II. ch. 22 and 8 Geo. II., ch. 23 (Revised Code of N. C., chap. 31, sec. 77), but upon the equitable principles regulating the settlement of insolvent estates, whether of persons or corporations, living or deceased. The settlements with such estates are *final*, and all *mutual* demands are to be balanced; claims not liquidated, and debts absolutely due, though not yet demanded, or payable in the future, are to be included. In *the nature of things*, the *balance* found upon such adjustment *is the only debt remaining;* the object is to *do equity* between and among all the parties interested, the *general laws of set-off* adopted *for cases in general, have nothing to do with the question.* The policy which dictated the general statutes of set-off was not the *doing of equity* between the parties, but the *prevention of unnecessary litigation—the discouragement of a multiplicity of suits;* if there are mutual debts, *of equal amounts*, subsisting between two persons, the object of these statutes is to prevent either from bringing a suit against the other, and their effect is, to punish the offender against this policy, by mulcting him with costs; if the debts be of *unequal amounts*, the owner of the lesser debt, presuming to sue, cannot recover, and falls under a like condemnation; and the owner of the greater, if he sue, is compelled, at the option of his adversary, (who is thereby relieved from the necessity of suing for his debt at all)—to recover *only the balance* in his favor. (*Haughton vs. Leary*, 3 Dev. & Bat., p. 21). But the *doing of equity* between the parties generally, was not within the purpose and intention of the law-makers: hence, the plaintiff cannot *reply a set-off* to a *set-off pleaded* by the defendant; the defendant cannot set-off a claim against the plaintiff *acquired after his suit was instituted*, by a *plea to the further maintenance of the action*, or *since the last continuance;* if the defendant's counter-claim exceeds the plaintiff's demand, the defendant *cannot have judgment for the balance* in his favor. But the equitable rule of set-off, applicable in insolvency and to cases like ours, is founded in the nicest natural equity; its policy is precisely the same as that in which the law relative to the *right of stoppage in transitu* originated. It is to prevent one man's debt from being paid with another man's money, which would take place if a man, being at once the debtor and creditor of the insolvent, were forced to *pay* the whole of his debt to the assignee of the estate, and to *receive* only a dividend on what was due him at the time of the assignment. But the rule ceases where the equity in which it rests ends; it cannot be extended beyond the point where the reason which gave it birth terminates; it is founded in equity and cannot be used to work iniquity; *its very being depends upon the existence of the* MUTUAL *debts or* MUTUAL *credits before and* at the *moment when the insolvency is judicially ascertained, and the assignment of the insolvent's estate is effected; this is the very equity which creates the rule.* Hence is our case, if one who was a debtor of the Bank before and at the date of its assignment, and, therefore, remains a debtor in the same amount to its estate in the hands of its Commissioner, shall afterwards voluntarily make himself a creditor of the estate, by purchasing a claim against it, what equity has he to be preferred before other creditors—before the very creditor from whom he purchased his claim? The simple fact that he was a debtor of the Bank at the time of its assignment, and remained a debtor to its estate in the hands of its Commissioner, when he purchased his claim against the estate, gives him no superior equity to other creditors; does not bring him within the reason of the equitable rule of set-off we have been discussing. Any one to secure the advantage of that rule of set-off, must bring himself within the *equity* which originates it, and the *reason* of the rule, by showing that he was not only a *debtor*, but also a *creditor* of the Bank, *at the time of assignment*, and *therefore never became indebted to its estate in the hands of its Commissioner*, *except for the balance of the account*, if *it* was against him. As soon as the estate of the Bank was assigned, all its creditors became at once equally entitled to their respective proportionate shares thereof; upon what principle of equity or law or justice. are the shares of all the other creditors to be reduced in amount, because *one* of them has transferred his share to a person whose debt to the estate constitutes part of the fund with which all are to be paid? If the object and purpose of the debtor, in making himself a creditor, was to obtain a preference over the other creditors, it was an *inequitable* purpose—for equality is equity—and a rule to set-off, founded on the most refined principles of equity, cannot be expanded to aid him in effectuating his inequitable object. Rose vs. Hart, 2 Smith's Leading Cases, (6th Am. Edtn.) English & Am. Notes, from p. 358 to p. 379; Eden. on Bankrupt Law, p. 201; Waterman on Set-Off, &c., pp. 218, 219 and notes.

4. Before dismissing this branch of my subject I desire especially to call your Honors' attention to the case of *The Exchange Bank of Va.* (*for Camp, trustee*) *v. Knox, &c.*, decided in May, 1870, in the Court of Appeals of Virginia. In that case the Court had under consideration the construction of an Act of the Virginia Legislature of the 12th of February, 1866, precisely similar in its object to our Act of 12th of March, 1866, but providing a different machinery to effectuate that object, in that it *required* the insolvent banks of that State *to make deeds of assignment* of all their estate, property, and effects to trustees, for the equal benefit of all their creditors. That case was as follows: The Exchange Bank of Virginia was, by its charter, authorised to issue notes of circulation, *which were, by said charter, made a valid tender to the bank in payment of any debt due to it.* After the late social war was over, the law of the 12th of February, 1866, was passed, requiring the insolvent banks of the State to make general assignments for the benefit of their creditors. The Exchange Bank being in that condition, made such an assignment to Camp, and the trustee, in the name of the bank and to his use, sued Knox &

Brothers, and also J. S. Knox, upon a promissory note, which they had made to the bank previous to the assignment.

The pleas were *nil debet tender* and *set-off;* and accompanying their pleas, and in support thereof, the defendants brought into Court and tendered the notes of the bank, in nominal value, sufficient to cover the debt, interest, and costs to that date, and prayed to have them regarded as a payment into Court of the plaintiff's demand. It was one of the admitted facts of the case, that the defendants had acquired their bank-notes *after* the bank had made its assignment, and they had notice thereof.

The Court held that the Act of February 12th, 1866, forbade and prevented all preferences among the creditors of the bank; that a debtor of the bank could not set-off notes of the bank bought up *after* the making of the deed of assignment, and notice thereof to such debtor; that the bank, being insolvent, its trustee was the trustee of the creditors and not of the bank, and was a purchaser for value of all the property and effects of the bank, for the benefit of its creditors; and that, though the charter of the bank required it to take its own notes in payment of a debt due to *it*, this did not authorize debtors of the bank to pay their debts in the hands of the trustee with notes of the bank bought up after the deed of assignment and notice thereof. *Exchange Bank of Va.* (*for Camp, trustee*) *v. Knox, &c.*, 19 Grattan R., p. 739.

Vide, also;

Hogg's Ex'tors v. Ashe, 1 Haywd., 471; *Farmers' Bank of Va. v. Anderson & Co.*, 19 Grattan, 739; *Robinson v. Gardiner*, 18 Grattan, 509; *United States v. Robertson*, 5 Pet., 659; *Planters' Bank v. Sharp*, 6 How., 329.

My conclusion is—that the principles of the Common Law, as well as the express terms of the Act of 12th of March, 1866, extend the right of set-off, *in cases to which the commissioner is a party, to mutual credits and mutual debts subsisting between the bank and the person who is the opposite party before and at the moment of its dissolution, and confine it to such debts and credits only; and hence, forbid a defendant to set-off a debt due by him to the commissioner, with the bills of the banks acquired after its dissolution.*

5. This *right of set-off* is not denied to the Defendant in the *Argument;* it is therein fully conceded, that, if the *Defendant* had acquired the bills of The Bank of Washington, and had presented them for payment at the bank, or even if he had simply held them without presentation, *before* his note was assigned to the plaintiff as a trustee for creditors, they would now be available, on common law principles, as well as by the express provisions of the Act of 12th of March, 1866, under which the assignment was made, as a set-off, one of two mutual *credits*, if not mutual debts, to satisfy or *compensate* his note in the plaintiff's hands. But the *Argument* is that the defendant acquired the bank-bills AFTER THE ASSIGNMENT of his note to the plaintiff to secure pre-existing debts; and AFTER HE HAD NOTICE of that assignment; and WITH THE INEQUITABLE DESIGN

of defeating the equal *pro rata* distribution of an insolvent bank's assets among all its creditors, and gaining a preference for himself, over and to the detriment of the other creditors; that, therefore, a state of *mutual indebtedness* never arose between the bank and the defendant, to which the statute regulating legal off-setting would apply, or which would come within that principle of *natural equity* which regards the *balance* on an account stated between the parties, as the only debt; if the Act of 12th of March, 1866, had not provided for vesting the *legal* title to the defendant's note in the plaintiff, this case would present *at law* an instance of mutual indebtedness within the statute of set-off; but the Act of 12th of March, 1866, and the proceedings in equity under it, *did* vest the *legal title* to the defendant's note in the plaintiff in November, 1866, before the defendant purchased his bank-bills; and even if the assignment had been *by an ordinary deed to a trustee to secure pre-existing debts*, whereby the *legal* title to the note would not have vested in the trustee, but he would have acquired only a specific equitable claim on it, yet a *Court of Equity* would not permit the defendant's *legal right of set-off* to defeat the plaintiff's *prior* equity,—not because the plaintiff is a technical purchaser for value, for he is not,—but, because the defendant's *equity*, though he has the legal right, *is inferior* to that of the plaintiff and the general creditors whom he represents, though the consideration on which their claim rests in only *meritorious; both* are but creditors of the bank, and the defendant acquired his legal counter-claim and became a creditor of the bank, *with full notice* of the previous transfer of his note to the plaintiff, and of his equitable lien thereof.

It is said the assignee to secure pre-existing debts is not a *purchaser for value:* true, but he takes the property subject only to *existing* liens and equities and legal defences. It is said the bank-debtor's set-off is a *legal* defence, while the right acquired by the assignee of a debt is but an *equity*, and *where equities are equal the law shall prevail*. In our case the assignee of the debt *does not acquire a simple equity;* the provisions of the Act of 12th of March, 1866, give him a *legal title* to the debt, and if they did not the *equities* of the general creditors, represented by the assignee, and of the bank-debtor, who has become a bill-holder *since* the assignment, are not *equal*. The bank-debtor has acquired his right by purchasing the bills of the bank, *after notice of the assignment of his debt* for the general creditors, and has thus endeavored to defeat that equality among creditors which equity loves,—*his equity is inferior* to that of the general creditors, represented by the bank's assignee.

Parsons on Notes and Bills vol. 2, pp. 46–51.

III.

Although, the 22nd section of the Ordinance of June 23rd, 1866, was in force, when the Bank assigned the Defendant's note to the Plantiff in November, 1866; and, although it is provided therein—'that in all actions, brought by any assignee of a bank, it shall be lawful for the Defendant to set-off by plea or on trial any note of such bank:' yet such Ordinance did not operate to reserve to the Defendant, as against a Commissioner of a bank under the Act of 12th of March, 1866, the right to purchase up the bills of the bank *after* his note was assigned to such Commissioner, and reduced to judgment in *his* name, and with them to set-off, or compensate, or discharge the judgment. Because the right of set-off, as against the Commissioner of a bank, is specially prescribed, regulated, and defined by the Act of 12th of March, 1866, and the provisions of the Ordinance prescribing, regulating, and defining the *general* right of set-off, as against the *general* assignees of a bank, cannot be construed to repeal or modify the *particular* and *special* provisions prescribed for a single case, by the Act of 12th of March, 1866: Because these provisions in the Ordinance are but a reservation from repeal of the *same* provisions, contained in the Act of 10th of March. 1866, already quoted, which last Act was ratified anterior to, and almost contemporaneously with, the Act of 12th of March, 1866, and if the provisions of one of these Acts are repugnant to provisions contained in the other, those of the Act of 10th of March, 1866, are repealed or modified by those of the Act of 12th of March, 1866; Because, even if the Ordinance be construed to embrace within its operation the right of set-off as against the Commissioner of a bank, it only gives that right to be asserted "*by plea or on trial*"—before judgment,—and does not give the right, as against *any* assignee of a bank, to set-off, or compensate, or satisfy a *judgment* recovered in his name, on a debt *once* due to a bank, with the bills of that bank, *acquired after the judgment was rendered:* Because the Ordinance itself, in so far forth as it purports to confer upon bank-debtors, the right, as against *any* assignee of a bank, to set-off their debts, in the hands of such assignee, with the bills of the bank acquired after the assignment and notice thereof, is repugnant to the Constitution of the United States, in that its effect is to make bank-bills a Legal-Tender.

1. To construe the *general* words of the 22nd section of the Ordinance of 23rd of June, 1866,—applicable to assignees of banks in *general*, and giving a right of set-off with bank-bills acquired at *any time before trial*—so as to repeal or modify the *particular* words of the Act of 12th of March, 1866—*limiting* the right of set-off against a *species* of assignees, created by the Act and called *Commissioners*, to claims against a bank *existing in the hands of its debtor at the time of the assignment*—is to violate every canon of construction recognized by the courts, and to repudiate a

principle which universally pervades the law, and is founded in sound sense and logic; for it is a maxim no less of logic than of law, that, *in toto jure generi per speciem derogatur, et illud potissimum habitum quod ad speciem pertinet.*

Your Honors are asked to hold, that the Ordinance is to be so construed as to repeal every salient feature of the Act of 12th of March, 1866, for the benefit of those debtors of a defunct bank who have deliberately gone about after its dissolution to make themselves its creditors, with the intent and for the purpose of acquiring for themselves an inequitable priority over the other creditors, and defeating the policy of equality among all the creditors, which originated that Act. This intention your Honors are asked to attribute to the law-making power of the State, not because the law-makers have *expressed* it, but because it is said to be necessarily *implied* from something else which they have expressed. The main provisions of the Act of 12th of March, 1866, have already been pointed out. It is needless to recapitulate here. If this legislation, subsequent to the 12th of March, 1866, be construed to extend to bank-debtors the right, as against the Commissioner of the Bank, to set-off their debts, in the hands of such commissioner, with the bills of the bank, acquired by them *after* its assignment of all its estate and effects, and consequent dissolution, under the provisions of the Act of 12th of March, 1866—then, such legislation, for the benefit of bank-debtors, and to the extent of their debts, repeals every prominent feature of the Act of 12th of March, 1866. For this subsequent legislation provides for a class of preferred creditors, without peculiar merits, who shall have priority of payment out of the Bank's assets: it enacts, that debts due *to* the Bank shall *not* be extinguished, *as such*, by its dissolution, and become but assets in the hands of its Commissioner, for equal rateable distribution among its late creditors: it enacts, that debts due *by* the Bank, in the shape of its outstanding bills, shall *not* be extinguished, *as such*, and become but claims for the holder's *quota* of the Bank's assets in the hands of its Commissioner: it enacts, that some favored claims against the Bank's assets *may* be preferred and prosecuted in some other court, in some other manner, and within some other period of time, than those prescribed in the Act of 12th of March, 1866: and it further enacts that, the right of set-off, in cases wherein the Commissioner of the Bank is plaintiff, shall *not* be limited to mutual credits, and mutual debts, subsisting between the defendant and the Bank at the moment of its dissolution: whereas the specific provisions of the Act of 12th of March, 1866, are to the very contrary of all this. To justify a construction which effects by implication this extensive repeal, the Defendant must successfully maintain the position—that provisions are to be found, in this subsequent legislation, so flatly repugnant to the Act of 12th of March, 1866, as that both laws cannot be executed by the courts; and, as the provisions of the earlier law are *positive, specific, and* *applicable to a particular class of cases only*, while all the subsequent legislation is in *general words, for all cases*, he must further succeed in maintaining *this* position: that no *effect at all* can be given to the provisions of this later legislation, but they must be rejected altogether, except they be construed to repeal the specific provisions of the Act of the 12th of March, 1866. This is the real point of law here at issue before your Honors, and the bare citing, and perusal of the statutes in question, without gloss and without comment, is my strongest argument.

Undoubtedly the last statute in point of time controls --*leges posteriores priores contrarias abrogant.* But it is only in cases of *irreconcilable repugnancy* that this rule applies; it gives way to the fundamental principle, that the intention of the Legislature is to govern. "A subsequent stat-"ute," says Parsons, Ch. J., "generally will control the provisions of a "former statute which are repugnant to it according to its strict letter. "But there are exceptions to this rule, depending on the construction "of the last statute agreeably to the intention of the legislature." (*Pease vs. Whitney*, 5 Mass. R., pp. 380–382.) The general rule is conceded to be that where two statutes contain *repugnant* provisions, the one last ratified is a repeal of one previously ratified. But this is so, merely because it is presumed to be so intended by the law-making power. Where the intention is otherwise, and that intention is manifest upon the face of either enactment, the plain meaning of the legislative power, thus manifested, is the *paramount* rule of construction. It is no part of the duty of the Judiciary to resort to technical subtleties to defeat the obvious purposes of the legislative power in a matter over which that power has a constitutional right to control. (Sedgwick on Stats., &c., p. 415.) If the last statute be in affirmative words, and contains no words of repeal and no *non obstante* clause, it works no repeal of a former statute *by implication*, unless the two statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them—in which event the latter is always deemed a repeal of the earlier statute. And though it is clearly settled, that statutes may thus be repealed by implication, and without any express words, still the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together. The principle is, that laws are presumed to be passed with deliberation, and with a full knowledge of all existing ones on the same subject; and it is therefore but reasonable to conclude that the legislature, in enacting a law, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence a repeal *by implication* is not favored, since it carries with it an implied reproach, that the Legislature has ignorantly, and without knowing it, made one Act repugnant to and inconsistent with another: and the repeal itself casts a reflection upon the wisdom of former Legislatures; (Broom's Legal Maxims, p.

29); on the contrary, Courts are bound to uphold the prior law, if the two may well subsist together. (Sedgwick on Stats., pp. 126–127.)

The reason of this rule of construction is stronger and more evident when the senior statute prescribes a *particular* rule for *special* cases, while the junior statute makes a different *general* rule for *all* cases. It is well settled that in construing statutes, and for the purpose of arriving at the legislative intent, all Acts *in pari materia* are to be taken together, and examined, in order to arrive at the true result. (Sedgwick on Stats., &c., p 247.) "All acts *in pari materia*," said Lord Mansfield, "are to " be taken together, as if they were one law." (Ailesbury vs. Patterson, 1 Doug. p. 30.) And it is a rule of construction, affecting all written instruments—that a thing which is given in *particular* shall not be taken away by *general* words; hence the maxim for the construction of statutes *clausula generalis non porrigitur ad ea quœ specialiter sint comprehensa.* In conformity to this doctrine it is held, that where a general intention is expressed in a statute, and the Act also expresses a particular intention, incompatible with the general intention, the particular intention shall be considered as an exception, and where general words follow particular words the rule is to construe the former as applicable to the things or persons particularly mentioned. (Sedgwick on Stats., &c., p. 123.) And so, it is laid down as a rule, that a general statute without negative words, will not repeal the particular provisions of a former one, unless the two Acts are irreconcilably inconsistent, perhaps not even then. The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original Act, shall not be considered as intended to affect the more particular or positive previous provisions, *unless it is absolutely necessary to give the later Act such a construction in order that its words shall have any meaning at all.* (Sedgwick on Stats., &c., p. 123)

In *Gregory's Case*, this principle of construction was applied. The 4 and 5 Phil. and Mar., ch. 5 enacted—that no person should *weave any woolen cloth as a trade*, without having served as an apprentice for seven years, under penalty of forfeiting the cloth so woven. The statute 5 Eliz., ch. 4, enacted that no person should *exercise any trade*, not having served as apprentice thereto for seven years, under penalty of forty shillings for every month he should so exercise it. In *Gregory's Case*, it was assigned for error that statute 4 and 5 Ph. and Mar. c. 5, was impliedly repealed by statute 5 Eliz. c. 4. "*Sed non allocatur.* For *inspecto statuto*, "they both stand together. And it was said, that a later statute in the " affirmative shall not take away a former Act; and *eo potius* if the former " be particular, and the later general." *Gregory's Case*, 6 Rep. fol. 19 b.

So in *William vs. Pritchard* (4. T. R. 2.) The Stat. 7 Geo. III, ch. 37, had authorized the adjacent proprietors to embank and inclose portions of the soil under the river Thames, and had enacted that such land should be "free from all taxes and assessments whatsoever." The Land Tax Act, 27 Geo. III, by general words embraced all the land in the kingdom; and the question came before the King's Bench, whether the land exempted in the earlier statute had been legally taxed; and it was held that the tax was illegal, because the *general* words of the later statute did not repeal the *particular* provisions of the earlier. Kenyon, Ch. J., delivering the opinion of the Court, said: "It cannot be contended "that a subsequent Act of Parliament will not control the provisions of "a prior statute, if it was *intended* to have that operation; but there are "several cases in the books to show, that where the intention of the "legislature was apparent that the subsequent Act should not have such "an operation, then, even though the words of such statute, taken "strictly and grammatically, would repeal the former Act, the courts of "law, judging for the benefit of the subject, have held that they ought "not to receive such a construction." *William vs. Pritchard*, 4.T. R. p. 2.

And it was said by the Court, in *Dr. Foster's Case*, that even if there be *general negative words* in the later statute, it shall not be construed to repeal the *particular* provisions of an earlier Act, provided they can both reasonably stand together. And it was announced *arguend* , that the Stat. 1 and 2 Phil. and Mar., c. 10, which enacted—"that *all trials* "hereafter to be had for *any* treason, shall be had according to the "course of the common law, *and not otherwise*"—did not abrogate statute 35 H. 8., c. 2, which authorized trials, not by the course of the common law, *for treason beyond the sea. Dr. Foster's Case*, 11 Rep., fol 63 a; which *dictum* was confirmed by decision in *Story's Case*, Dyer, fol. 299 b.

And for an application of the same principle by the Supreme Court of North Carolina. *Vide, State v. Jones*, 67 N. C. Rep., 210-215-216.

2. The 22d section of the Ordinance of June 23d, 1866, it is but a re-enactment, almost *totidem verbis*, of the 15th section of the Act of 10th of March, 1866, already quoted. The ordinance by its 23d section repeals that Act, but preserves and perpetuates the 15th section of the Act, by republishing it in the 22d section of the Ordinance. The effect of both sections, 22d and 23d, of the Ordinance together, is exactly the same as if all the Act of 10th of March, excepting its 15th section, had been repealed by the Ordinance, no more, and no less. If the Convention of 1866 had pursued this latter method of effecting their object, it would never have occurred to the most astute intellect, that the Ordinance in any manner modified or repealed any of the provisions of the Act of 12th of March, 1866. It is only by a misapplication of the maxim *leges posterior priores contrarias abrogant*, that a doubt is suggested. The maxim is good law, but the 22d section of the Ordinance, in its relation to the Act of 12th of March, 1866, is not a *lex posterior*, within the meaning of the

rule. The provisions of the 22d section of the Ordinance then constituting the 15th section of the Act of 10th of March, 1866, were part of the law of the State *before* the Act of 12th of March 1866. If there be any repugnancy between the two, the latter controls the former, as I have already pointed out. The rule *leges posteriores*, &c., like all other rules of construction, is but a canon adopted by the Courts to aid them in arriving at the *intention* of the law-maker; it cannot be used to defeat the very object for which it was made, it cannot be carried beyond the reason out of which it arose. The question at last always is, was it the *intention* of the law-maker, in enacting one law, to modify or repeal another? To ascertain the apparent intention of the law-maker, is the supreme law of construction. The last law in point of time controls the provisions of anterior laws inconsistent therewith, because it is the latest expression of the legislative will, and prescribes a *new rule* of action. The Courts no more readily *presume* an intention, on the part of the Legislature, to subtract from the existing body of the law by repealing part of it, than they *presume* an intention to add to it by enacting a new statute. Either intention must be expressed; this is the general rule. But when the latest law in point of time affirmatively prescribes a *new rule of action* absolutely irreconcilable with some previous existing rule, one must give way; both cannot be enforced and administered; the Courts must choose between them: they cannot attribute to the Legislature an intention that *both* rules of action shall be observed, *ex hypothesi*, that is absurd; they are absolutely irreconcilable. And *because* the *latest law* is the *latest* expression of the legislative will, the Courts, *ex necessitate*, attribute to the law-makers an *intention*, in enacting it, to repeal the older rule of action inconsistent with it.

But when the last statute repeals expressly some earlier statute, perpetuating, however, some of its provisions, either by republishing them in connection with, or excepting them out of, the general repeal of the earlier Act, the provisions of the earlier statute, thus preserved from extinction, cannot, with truth, be called the *latest* expression of the legislative will; the *latest* expression of the legislative will is only that the excepted provisions of the earlier Act shall not be repealed along with the rest: and the *excepted provisions themselves* are the expression of the legislative will *at the time when the earlier* statute was enacted; and for the very reason on which the rule of *leges posteriores, &c.*, rests, must be held by the courts to have been modified by any inconsistent intermediate legislation enacted between the time when the earlier statute was ratified, and the date of the repealing Act.

3. Even if the Ordinance be construed to embrace within its operation the right of set off as against the Commissioner of a bank, it only gives that right to be asserted "*by plea or on trial*"—before judgment—and does not give the right, as against *any* assignee of a bank, or even as

against the bank itself, to set off, or compensate, or discharge a *judgment*, recovered on a note originally made to a bank, with the bills of that bank, *acquired after the judgment was rendered*. It is unnecessary to elaborate this point; our general statute regulating off-sets, (*Rev. Code of N. C.*, ch. 31, sec. 77), uses the same expression—"*by being pleaded* "*in bar, or given in evidence on the general issue on notice given of the parti-* "*cular sum intended to be set-off, &c.*" And in construing this, it has ever been held that the counter claim set up by the Defendant, must be one *held by him when the suit was instituted, and remaining due, in statu quo ante litem matam, when pleaded or offered in evidence*. (*Haughton vs. Leary*, 3 Dev. & Bat., 21; *Mizell vs. Moore*, 7 Ired., 225). Conceding to the Defendant, a construction of the Ordinance, which extends the right of set-off to bank-bills acquired by him up to the time of trial—for the sake of the argument—it is difficult to conceive how any court can construe it so as to confer upon him a right to acquire a defence after the suit is terminated by judgment. The Act of March 4th, 1871, already quoted, which purports to amend the Ordinance, for the *first* time inserts therein the provision that bank-bills may be set off by a Defendant—"*whether or not the same were in the possession of the Defen-* "*dant at the time of suit brought*;" the Legislature, therefore seems to have entertained the opinion, that bank-bills were not, by the Ordinance, made a valid set-off in *any* suit, whether instituted by the bank, or its assignee, or endorsee, *unless the Defendant held them at the time when the suit was brought;* and it may very well have been, that the *intention* of the Convention in establishing the Ordinance, was only to make a bank-bill a good cause of action, for the purposes of counter-claim, without a previous demand of payment, which, before this Ordinance, it was not: *Vide Bank of the State vs. Bank of Cape Fear*, 13 Ired., p. 75; *Nichols vs. Pool*, 2 Jones, p. 23; *Crawford vs. Bank of Wilmington*, Phil., p. 136; *Bank, &c., vs. Howard*, 13 Mass. R., p. 235; *Suffolk Bank vs. Lincoln Bank*, 3 Mason, C. C. R., p. 1: to dispense with the "*notice of the par-* "*ticular amount intended to be set off, and on what account the same is due*," when the *general issue* is pleaded, required by the general statute of set-off; *Vide* Rev. Code, ch. 31, sec. 77, p. 176; and to allow a bank-bill to be used as an offset, even where the plaintiff in the suit is not the bank itself, but its cashier, president, or an assignee, suing for its use; for according to the custom of the banks of this State, many of the notes and bills discounted by a bank were made payable to its cashier or president, and our Courts had held that a note drawn payable to the cashier of a bank could be sued for only by him in his personal and not in his official capacity; *vide Horah vs. Long*, 4 Dev. & Bat., p. 275; and perhaps to allow bank-bills acquired after the assignment, *and before suit brought*, to be used as a set-off against the assignee; (which was not allowed before the Ordinance. *Haywood vs. McNair*, 3 Dev., 231; 2 Dev. & Bat., 283; *Turner vs. Beggarly*, 11 Ired., 331; *Wharton vs. Hopkins*, *Ib.*, 505; *Little* *vs. Dunlap* Bus., 40). But conceding to the Defendant the right to set-off his debt in the hands of the assignee with bills acquired at any time before trial and judgment—I repeat, it is difficult to conceive, how any court, can so construe this Ordinance, as to make it confer upon a Defendant a right to acquire a *defence* against a cause of action, *after* the suit thereon has been *terminated* by judgment, and the *cause of action been merged* in such judgment. I have said something upon this topic in the earlier part of this argument, when discussing the *Opinion* of the Supreme Court of N. C. in this case, to which I refer. And have there pointed out the broad line of demarcation between the right of set-off with bank bills *by plea or on trial* —where the Plaintiff may traverse the defence, and have it tried by a jury—and the right to *discharge* a judgment already rendered, with bills of the bank acquired after it was rendered. But on the 22nd of August, 1868, the General Assembly of N. C. enacted one statute, and on the 17th of March, 1869, enacted another, and on the 13th of December, 1869, enacted another, all of which are already quoted, and all of which are upon the subject of using bank-bills as off-sets; by the Act of 17th of March, 1869, amending the Act of 22nd of August, 1868, it is for the *first* time enacted, that said Act of 1868 shall be so amended, "*as to* APPLY TO THE JUDGMENTS AND EXECU-"TIONS WHICH MAY HAVE BEEN OBTAINED *on any debt due any bank*;" and by the Act of 13th of December, 1869, it is provided—"*that when any* "JUDGMENT HAS BEEN, OR SHALL HEREAFTER BE *recovered in any court* "*of this State, upon any note payable to any bank, it shall be lawful for the* "*Defendant in such judgment, to pay and satisfy the same with the bills of* "*the bank.*" All these laws, *in pari materia*, are to be construed together—and, with what show of reason, can we account for this *subsequent* legislation of the Genl. Ass. of N. C., if, an *Ordinance*, already then in force, gave bank-debtors the same right, which this subsequent legislation purports to confer on them; to wit: the right to set-off, or compensate, or discharge, with the bills of the bank, *judgments, which had already been, or should thereafter be recovered against them on their contracts with the bank?* Beyond peradventure the Genl. Ass. supposed, the *Ordinance* could bear no such construction.

4. Finally, the *Ordinance* itself—in so far forth as it purports to confer upon bank-debtors the right, as against *any* assignee of a bank, to set-off their debts in the hands of such assignee, with the bills of the bank acquired after the assignment and notice thereof—is repugnant to the Constitution of the U. S., in that its effect is to make bank-bills a Legal-Tender.

(*a.*) By Constitution of U. S. (Art. I, sec. 8): "The Congress shall "have power * * * to coin money, regulate the value thereof, and "of foreign coin * * * ;"—and (Art. I, sec. 10)—"no State shall "* * * coin money; emit bills of credit; make anything but gold and "silver coin a tender in payments of debts:" and in the same section—"no State shall pass any law impairing the obligation of contracts."

If, after a debt, contracted with a bank, is assigned to a *bona fide* purchaser, a State Legislature enacts a statute giving the debtor, who has notice of the assignment, the right to set off, or discharge the debt as against the assignee, with the bills of the bank, acquired after such notice. the Statute is clearly repugnant to the Constitution of U. S.; *because it impairs the obligation of a subsisting contract*, which had arisen between the debtor and the assignee, at the time the assignment was made, and notice thereof given: The Statute is also repugnant to the Constitution of the U. S. because, in effect, it makes bank-bills a Legal-Tender in discharge of the debt. But if the Statute were enacted *before* the assignment was made—its validity could not be impeached, *upon the ground that it impaired the obligation of a subsisting contract*—because the contract between the debtor and the assignee did not arise until *after* the passage of the Act—it was not *subsisting* when the Statute was enacted—*the Statute operated on the obligation of the contract, at the time it was entered into, so as to restrict that obligation within the limits prescribed by the Statute;* an obligation must exist before it can be impaired by legislation, and it would seem to be somewhat of a salecism to say, that the Statute which *limits the extent of the obligation* of the contract, and controls *it*, at the very moment when the contract is made *impairs* that obligation. But even though the Statute were enacted before the assignment, it would yet be liable to the obligation—*that it made bank-bills a Legal-Tender in payment of debts.* In other words, in the application of that limitation upon the legislative power which ordains "*that no State shall make anything but gold and silver coin a tender in payments of debts,*"—there is no well founded distinction to be made between the constitutional validity of an Act of a State Legislature declaring bank-bills a Legal-Tender for the payment of debts contracted *after* its passage, and that of an Act making them a Legal-Tender in payment of *all* debts, as well those existing *before*, as those contracted after its enactment. There may be, and is, a difference in the *effects* produced by the Acts respectively, and in the *hardship* of their respective operations—but in both cases the fundamental question, *that which tests the validity* of the legislation, is, can a State by any legislation, in any legislative body, give to bank-bills the character and qualities of *money?* Make the offer of payment with them, by the name of tender, or the name of set-off—operate to discharge the debtor from his obligation? To say that this can be done by a State *Law* in force at the time when the debt is contracted is begging the whole question of the construction of this clause of the Constitution—a *law* may determine the obligation of a contract on the happening of a contingency, *because it is the law.* If it be not the *law* it cannot have this effect—when its existence as a *law* is denied, that cannot be proved by showing what are the qualities of a law. In our system the Acts of a State Legislature, or the ordinances of a State Convention, are *laws* in all cases where their action is not restrained by the Constitution of U. S. When it is so restrained their Acts and Ordinances are not *Law*. And the question returns upon us—is an ordinance of a State Convention which makes bank-bills a Legal-Tender in bayment of *future debts* A LAW? Is it consistent with or repugnant to the Constitution of the U. S.? and this question is to be solved only by the Constitution itself.

I cannot persuade myself that it is proper for me to attempt to sustain by extended argument what this Court has frequently, and invariably decided—that the clause of the Constitution of U. S. forbidding a State to pass laws impairing the obligation of contracts, has been interpreted to be a prohibition upon *retrospective* legislation impairing the obligation of past and *subsisting* contracts, and as not affecting the power of the States over the *validity*, and *construction* of *future* contracts—over the *evidence* by which *they* must be established, or the *remedies* by which *they* must be enforced—is well settled by numerous authorities—while, in many, perhaps in all the cases in which this doctrine is established, the contrast is drawn between the clause prohibiting legislation which impairs the obligation of contracts—and the clause which forbids a State to make anything but gold and silver coin a tender in payments of debts; and attention is directed to the fact—that this latter clause forbids a State to pass *tender laws* which shall apply to either past, present, or *future* contracts.

In *Sturges v. Crowninshield*, 4 Wheat., 122; and, in *Farmers' & Mechanics' Bank of Pa. v. Smith*, 6 Wheat., 131, it was *held*—that a State Bankrupt Law, which discharged the person and future acquisitions of a debtor from his liability under contracts entered into *before* the passage of the law, impaired the obligation of those contracts within the meaning of those terms as used in Constitution of the United States; while in the *great* case of *Ogden v. Sanders*, 12 Wheat., 213, it was *held*—that the obligation of a contract is not impaired by a State Bankrupt Law, which discharges the person and future acquisitions of the debtor from his liability under contracts entered into in that State *after* the passage of the Act. So Statutes of Frauds and Perjuries. Statutes against usury and the like—Statutes of Limitations—where they operate *prospectively* upon contracts *thereafter* made, or where the last give a *reasonable* time to enforce existing contracts before put in operation—are not laws impairing the obligation of contracts; but, if they be made to operate upon contracts *already entered into*, and *destroy* the remedy thereon, without first affording a *reasonable* time within which to enforce them—they do impair the obligation of contracts, and are unconstitutional and void. Said *Marshall C. J.*, in *Ogden v. Sanders*, 12 Wheat., 348: "The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances on

"which the original validity of a contract shall be made to depend. If
"the legislative will be, that certain agreements shall be in writing, that
"they shall be sealed, that they shall be attested by a certain number of
"witnesses, that they shall be recorded, or that they shall assume any
"prescribed form before they become obligatory, all these are regula-
"tions which society may rightfully make, and which do not come with-
"in the restrictions of the Constitution, because they do not impair the
"obligation of the contract. The obligation must exist before it can be
"impaired—and a prohibition to impair it, when made, does not imply
"an inability to prescribe those circumstances which shall create its ob-
"ligation. The Statutes of Frauds, therefore, which have been enacted,
"in the several States, and which are acknowledged to flow from the
"proper exercise of State Sovereignty, prescribe regulations *which must*
"*precede the obligation* of the contract, and consequently they cannot im-
"pair that oblrgation. Acts of this description, therefore, are most clear-
"ly not within the prohibition of the Constitution." Said *Trimble J.*, in
"the same case (12 Wheat., 327). "If a Statute of Frauds and Perjuries
"should pass in a State formerly having no such laws, purporting to ope-
"rate upon *existing contracts*, as well as upon those made after its pas-
"sage, could it be doubted that, so far as the law applied to and operated
"upon *existing* contracts, it would be a law" impairing the obligation of
"contracts: * * * The great principle intended to be established by
"the Constitution, was *the inviolability of the obligation of contracts, as the*
"*obligation existed and was recognized by the laws in force at the time the*
"*contract was made.* It furnished to the legislatures of the States a sim-
"ple and obvious rule of justice, which, however, theretofore violated,
"should, by no means, be thereafter violated; and, while it leaves them
"at full liberty to legislate upon the subject of all *future* contracts, and
"assign to them either no obligation, or such qualified obligation as in
"their opinion may consist with sound policy, and the good of the peo-
"ple, *it prohibits them from retrospecting upon existing* obligation, upon
"any pretext whatever,"—and *vide*, also *opinion* of *Washington J.*, in
same case, 12 Wheat., 254 to 263. In *Sturges v. Corninshield*, 4 Wheat.,
206: *Marshall C. J.*, delivering the opinion of this court, says—"By
"way of analogy, the Statutes of Limitations, and against usury have
"been referred to in the argument; and it has been supposed that the
"construction of the Constitution, which this opinion maintains, would
"apply to them also, and must, therefore, be too extensive to be correct.

"We do not think so. Statutes of Limitations relate to the remedies
"which are furnished in the courts. They rather establish, that certain
"circumstances shall amount to evidence that the contract has been per-
"formed than dispense with its performance. If, in a State where six
"years may be pleaded in bar to an action of *assumpsit*, a law should
"pass, declaring that contracts already in existence, not barred by the
"Statute, should be construed to be within it, there could be no doubt

"of its unconstitutionality;" again he says, page 207: "So with respect "to laws against usury. If the law be, that no person shall take more "than six *per centum per annum* for the use of money, and that if more "be reserved, the contract shall be void, a contract made *thereafter* re-"serving seven per cent. would have no obligation in its commencement; "but, if a law should declare that contracts *already entered into*, and re-"serving legal interest, should be usurious and void, either in whole or "in part, it would impair the obligation of the contract, and would be "clearly unconstitutional." So again, *Washington J.*, in *Ogden v. Sanders*, 12 Wheat., 262, says: "It is thus most apparent that whichever "way we turn, whether to laws affecting the *validity*, the *construction*, or "the *discharges* of contracts, or the *evidence*, or the *remedy* to be employ-"ed in enforcing them, we are met by this overruling and admitted dis-"tinction, between those which operate retrospectively, and those which "operate *prospectively*. In *all of them the laws are pronounced to be void in* "*the first class of cases, and not so in the second.*"

In the opinions just cited there was much disagreement, and great variety, in the course of reasoning by which the several judges respectively arrived at their conclusions- but there was no disagreement, and no variety in the conclusions at which they did arrive—viz: that State Statutes affecting the validity, the construction, the evidence to authenticate, and the remedy to enforce *future* contracts, did not "*impair their* "*obligation*" within the meaning of those terms as used in the Constitution of the U. S., but were valid, and binding on the contracting parties, who had notice of their existence when they contracted—while State Statutes, destroying the validity of, altering the construction of, requiring new modes of authentication for, or practically taking away the remedy to enforce, *past* and *existing* contracts, did "*impair their ob-*"*ligation*," within the meaning of those terms as used in the Constitution of U. S.—were not valid, and did not bind the parties to such past and existing contracts. And there was also entire unanimity in the conclusion at which they all arrived, that in this respect, there is a difference between the clause which prohibits a State to pass a law "impair-"ing the obligation of contracts"—and the clause which prohibits a State from "making anything but gold and silver coin a tender in pay-"ment of debts;" in that, the first mentioned clause operates to prevent *retrospective* laws, impairing the obligation of *past* and *subsisting* contracts only—while the latter clause is *universal* in its application, extends to all debts, and embraces within its operation contracts whether *past*, *existing*, or *future*; further, that the two clauses were inserted in the Constitution *diverso intuitu;* and that the provision respecting the impairing the obligation of contracts—*is not directed towards the inhibition of* STATE TENDER LAWS, since such laws do not impair the obligation of contracts, either past, existing, or future. Nor does the provision, forbidding a State to make anything but gold and silver coin a tender in payments of debts, *restrain the State from passing laws impairing the obligation of contracts*, since, there cannot be a law impairing the obligation of contracts, which provides for their discharge, in what, that very law, MAKES *lawful money at the time of the discharge.* That the restraint upon State Legislation impairing the obligation of contracts, was inserted *to prevent oppressive, unjust, arbitrary, and tyrannical laws, affecting existing private rights of property:* while the prohibition, upon making anything but gold and silver coin a tender in payments of debts, had no such aim, but was designed, *to prevent encroachments upon the national authority to coin money and regulate the value thereof—and so to secure a* FIXED AND UNIFORM STANDARD *of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated.*

In *Ogden vs. Sanders*, 12 Wheat., 213, where all the judges delivered opinions *seriatim*—except *Marshall*, Ch. J., and *Story* and *Duvall*, J. J., who united in a single opinion. *Washington*, J., discussing the interpretation of section 10, Article I, of the Constitution—says, (page 265): "It declares that "no State shall coin money, emit bills of "credit, make anything but gold and silver coin a tender in payment of "debts." These prohibitions, associated with the powers granted to "Congress "to coin money, and to regulate the value thereof, and of for-"eign coin," most obviously constitute members of the same family, "being upon the same subject and governed by the same policy.

"This policy was to provide a fixed and uniform standard of value "throughout the United States, by which the commercial and other "dealings between the citizens thereof, or between them and foreigners, "as well as the moneyed transactions of the government, should be reg-"ulated. For it might well be asked, why vest in Congress the power "to establish a uniform standard of value by the means pointed out, if "the States might use the same means, and thus defeat the uniformity "of standard, and, consequently the standard itself? And why estab-"lish a standard at all, for the government of the various contracts "which might be entered into, if those contracts might afterwards be "discharged by a different standard, or by that which is not money, "under the authority of State tender laws! It is obvious, therefore, "that these prohibitions, in the 10th section, are entirely homogeneous, "and are essential to the establishment of a uniform standard of value, "in the formation and discharge of contracts. It is for this reason, in-"dependent of the phraseology which is employed, that the prohibition "in regard to State tender laws will admit of no construction which "would confine it to State laws which have a retrospective operation.

"The next class of prohibitions contained in this section consists of "bills of attainder, *ex post facto* laws, and laws impairing the obligation "of contracts. Here, too, we observe, as I think members of the same "family brought together in the most intimate connection with each "other. The States are forbidden to pass any bill of attainder or *ex "post facto* law, by which a man shall be punished criminally or penally, "by loss of life, of his liberty, property, or reputation, for an act which, "at the time of its commission, violated no existing law of the land. "Why did the authors of the Constitution turn their attention to this "subject, which, at the first blush, would appear to be peculiarly fit to "be left to the discretion of those who have the police and good gov-"ernment of the State under their management and control? The only "answer to be given is, because laws of this character are oppressive, "unjust, and tyrannical; and, as such, are condemned by the universal "sentence of civilized man. The injustice and tyranny which charac-"terizes *ex post facto* laws, consists altogether in their retrospective op-"eration, which applies with equal force, although not exclusively, to "bills of attainder. But if it was deemed wise and proper to prohibit "State legislation as to retrospective laws, which concern, almost ex-"clusively, the citizens and inhabitants of the particular State in which "this legislation takes place, how much more did it concern the private "and political interests of the citizens of all the States, in their com-"mercial and ordinary intercourse with each other, that the same pro-"hibition should be extended civilly to the contracts which they might "enter into?"

Johnson J says (page 288): "It has also been urged, with an earnest-"ness that could only proceed from deep conviction, that insolvent laws "were tender laws of the worst description, and that it is impossible to "maintain the constitutionality of insolvent laws that have a *future* ope-"ration, without asserting the right of the States to pass tender laws, "provided such laws are confined to a *future* operation.

"Yet to all this there appears to be a simple and conclusive answer. "The prohibition in the constitution to make any thing but gold or sil-"ver coin a tender in payment of debts is *express and universal.* The "framers of the constitution regarded it as an evil *to be repelled without "modification;* they have, therefore, left nothing to be inferred or de-"duced from the constitution on this subject. But the contrary is the "fact with regard to insolvent laws; it contains no express, &c., &c."

Thompson J. says, (page 305). "It was pressed upon the court with "great confidence, and as it struck me at the time with much force, that "if this restriction could not reach laws existing at the time the contract "was made, State legislatures might evade the prohibition (immediately "preceding) to make any thing but gold and silver a tender in payment "of debts, by making the law prospective in its operation, and applica-"ble to contracts thereafter to be made. But, on reflection, I think, no "such consequences are involved. When we look at the whole clause in "which these restrictions are contained, it will be seen that the subjects "embraced therein are evidently to be divided into two classes; the one "of a public and national character, the power over which is entirely "taken away from the States; and the other relating to private and per-"sonal rights, upon which the States may legislate under the restrictions "specified. The former are, "no State shall enter into any treaty, al-"liance, or confederation, grant letters of marque and reprisal, coin mo-"ney, emit bills of credit." Thus far there can be no question that they "relate to powers of a general and national character. The next in or-"der is, or "make any thing but gold and silver a tender in payment of "debts;" this is founded upon the same principles of public and national "policy, as the prohibition to coin money and emit bills of credit, and is "so considered in the commentary on this clause in the number of the "Federalist I have referred to. It is there said, the power to make any-"thing but gold and silver a tender in payment of debts, is withdrawn "from the States, on the same principles with that of issuing a paper "currency. All these prohibitions, therefore, relate to powers of a pub-"lic nature, and are *general* and *universal in the application*, and insepa-"rably connected with national policy. The subject matter is entirely "withdrawn from State authority and State legislation. But the suc-"ceeding prohibitions are of a different character; they relate to per-"sonal security and private rights, namely, or "pass any bill of attain-"der, *ex post facto* law, or law impairing the obligation of contracts." "The subject matter of such laws is not withdrawn from the States; but "the legislation thereon must be under the restriction therein imposed. "States may legislate on the subject of contracts, but the laws must not "impair the obligation of such contracts. A tender of payment neces-"sarily refers to the time when the tender is made, and has no relation "to the time when the law authorizing it shall be passed, or when the "debt was contracted. The prohibition is, therefore, general and un-"limited in its application."

Trimble, *J.*, says, (page 628): "It is argued that as the clause declar-"ing that 'no State shall pass any law impairing the obligation of con-"tracts,' is associated in the same section of the Constitution with the "prohibition to 'coin money, emit bills of credit,' or 'make anything "but gold and silver coin a legal tender in payment of debts;' and as "these all evidently apply to legislation in reference to future as well as "existing contracts, and operate prospectively, to prohibit the action of "the law, without regard to the time of its passage, the same construc-"tion should be given to the clause under consideration.

"This argument admits of several answers. First, as regards the pro-"hibition to coin money and emit bills of credit. The constitution had "already conferred on Congress the whole power of coining money and "regulating the current coin. The grant of this power to Congress, and "the prohibitions upon the States, evidently take away from the States "all power of legislation and action on the subject, and must, of course, "apply to the future action of laws, either then made or to be made. "Indeed, the language plainly indicates that it is the act of 'coining "money,' and the act of 'emiting bills of credit,' which is forbidden, "without any reference to the time of passing the law, whether before "or after the adoption of the Constitution. The other prohibition, to "'make anything but gold or silver coin a tender in payment of debts,' "is but a member of the same subject of currency committed to the gen-"eral government and prohibited to the States. And the same remark "applies to it already made as to the other two. The prohibition is, "not that no State shall pass any law, but that even if a law does exist, "the 'State shall not make anything but gold and silver coin a legal "tender' The language plainly imports that the prohibited tender "shall not be made a legal tender, whether a law of the State exists or "not. The whole subject of tender, except in gold and silver, is with-"drawn from the States. These cases cannot, therefore, furnish a sound "rule of interpretation for that clause which prohibits the States from "passing laws 'impairing the obligation of contracts.' This clause re-"lates to a subject confessedly left wholly with the States, with a single "exception; they relate to subjects wholly withdrawn from the States, "with the exception that they may pass laws on the subject of tender in "gold and silver coin only."

Marshall, Ch. J., says, (page 336): "In construing that part of the clause "which respects tender laws, a distintion has never been attempted be-"tween debts existing at the time the law may be passed, and debts af-"terwards created. The prohibition has been considered as total; * * * "This distinction has never, we believe, occurred, to any person. How "soon it may occur is not for us to determine. We think it would un-"questionably defeat the object of the clause."

In *Sturges vs. Crowinshield*, 4. Wheat. 122, *Marshall*, Ch. J., delivering the opinion of the Court, says, (page 204): "Was this general prohibi-"tion—(the clause forbidding laws impairing the obligation of con-"tracts)—intended to prevent paper money? We are not allowed to "say so, because it is expressly provided, that no State shall 'emit bills "of credit;' neither could these words be intended to restrain the States "from enabling debtors to discharge their debts by the tender of prop-"erty of no real value to the creditor, because for that subject also par-"ticular provision is made. Nothing but gold and silver coin can be "made a tender in payment of debts."

In *The Leagl Tender Cases* (12 Wall. 457), there was a divided Court, but the dissenting members agreed with the Court, in what the Constitution intended with respect to securing a uniform currency.

Strong J. says (page 545): "The Constitution was intended to frame "a government as distinguished from a league or compact,—a govern-"ment supreme in some particulars over States and people. It was de-"signed to provide the same currency, having a uniform legal value in "all the States. It *was for this reason* the power to coin money and regulate its value was conferred upon the Federal government, while the "same power, as well as the power to emit bills of credit was withdrawn "from the States. The States can no longer declare what shall be money, or regulate its value—whatever power there is over the currency, "is vested in Congress. If the power to declare what is money is not in "Congress, it is annihilated."

And *Clifford J.*, in his dissenting opinion, says (page 602): "Power "to coin money and regulate the value of domestic and foreign coin was "vested in the natural government *to produce uniformity of value*, and to "prevent the embarrassments of a perpetually fluctuating and variable "currency,"—and again (page 612): "Authority to coin money was "vested in Congress to provide a permanent national standard of value, "*everywhere the same, and subject to no variation except what Congress shall* "*make* under the power to regulate the value thereof."

In the same case, *Strong J.*, speaking for the Court—with great force maintained the proposition, that a tender *law* requiring a creditor to accept in payment a different and less valuable circulating medium than that which existed, and was in the contemplation of the parties at the time when the contract was made—*did not impair the obligation of the contract.* Speaking of the Acts of Congress, making treasury notes a legal tender in payment of debts contracted before their ratification—he says, (page 548–549): "The argument—(that these laws are prohibited "by the spirit of the Constitution because they indirectly impair the obligation of contracts)—assumes two things,—*first*, that, the Acts do, in "effect, impair the obligation of contracts, and *second*, that Congress is "prohibited from taking any action which may indirectly have that effect,—neither of these assumptions can be accepted.

"It is true that under the Acts, a debtor, who became such before they "were passed, may discharge his debt with the notes authorized by "them, and the creditor is compellable to receive such notes in discharge "of his claim. But whether the obligation of the contract is thereby "weakened, can be determined only after considering what was the contract obligation. It *was not a duty to pay gold or silver, or the kind of* "*money recognized by law at the time when the contract was made, nor was it* "*a duty to pay money of equal intrinsic value in the market.* * * * "The expectation of the creditor and the anticipation of the debtor may "have been that the contract would be discharged by the payment of "coined metals, but neither the expectation of one party to the contract "respecting its fruits, nor the anticipation of the other constitutes its "obligation. * * * But the *obligation* of a party to pay money—is— "*to pay that which the law shall recognize as money when the payment is made.* "If there is any thing settled by decision it is this, and we do not understand it to be controverted—* * * * Every contract for the payment of money, simply, is necessarily subject to the constitutional pow-

"er of the government over the currency, whatever that power may be, "and the obligation of the parties is, therefore, assumed with reference "to that power. * * * * There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. " * * * Contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. "They are engagements to pay with lawful money of the United States, "and Congress in empowered to regulate that money. It cannot, therefore, be maintained that the legal tender Acts impaired the obligation "of contracts."

In *Briscoe v. Bank of Com. of Ky.*, 11 Pet., 316-317, *McLean J.*, delivering the opinion of the Court, says: "If the Legislature of a State attempt to make the notes of any bank a tender, the Act will be unconstitutional; * * * That by the Constitution, the currency, so far as "it is composed of gold and silver, is placed under the exclusive control "of Congress, is clear."

In *Veazie Bank v. Fenno*, 8 Wall., 533: This Court, speaking by the Chief-Justice (*Chase*) declared, that it was the constitutional right of Congress to provide a currency for the whole country—that this might be done by coin, or United States notes, or notes of National banks—that in the exercise of this power Congress might tax the bills of State Banks out of existence, for the benefit of a paper currency furnished by Congress. And the *Legal Tender Cases*, 12 Wall., 457—seem to settle by decision, that the currency so far as it is composed of a paper promises to pay, is also under the *exclusive* control of Congress.

Vide, also, 2 *Story on Const.*, secs. 1371-1372.

(*b.*) The propositions which I maintain, and which I derive from these authorities, are;

(1.) That the Constitution confers upon the Congress the *exclusive* right to provide, regulate, and control, a fixed and *uniform* currency for the *whole* Union, in which *all* commercial dealings, and moneyed transactions within the United States *must* be conducted, and prohibits the States encroaching in *any* respect upon this prerogative of the Federal Government.

(2.) That the restraint upon the States, contained in the 10 sec. of the I Art. of the Const.—whereby they are fobidden to make anything but gold and silver coin a tender in payments of debts—in total, absolute and universal.

(3.) That reading this restriction in the light afforded by the other parts of the Constitution, and especially by section 8 of Art. 1—whereby Congress is empowered to coin money and regulate the value thereof, the

conclusion is inevitable—that the policy which dictated this restriction, was not the prevention of unjust and arbitrary legislation, which by retrospective action unreasonably invaded vested private rights either of person or property—but the prevention of State encroachment on the exclusive right, of the nation to provide, regulate, and control the currency of the whole Union—and the preservation of the fixed, and uniform standard of value throughout the United States, which Congress was required to establish and provide for the whole Union.

(4) That in view of this express restriction on the States, and the policy which dictated it—to show that a State Statute does not, in its application to a particular case, arbitrarily and unjustly invade a private right,—does not impair the obligation of an existing contract—is no argument to prove *it is not* a tender-law within the prohibition of the constitution; and to show that, in the particular case, it does arbitrarily and unjustly invade a private right,—does impair the obligation of a contract—is no argument to prove *it is* such a tender law; the test is—does it compel the creditor, against his will, to accept in satisfaction of his claim, some other thing, than the fixed and uniform currency provided for the whole Union, by Congress, in accordance with the Constitution—whether of more or less intrinsic value than that currency.

(5.) That in view of this express restriction on the States, and the policy which dictated it—a State has no more power or right to make *bank-bills* a legal-tender in payment of debts, than she has to make the promissory notes of any other corporation or person, or any other species of property a legal-tender; the restraint upon her is absolute and universal—as to everything but gold and silver coin.

(6.) That in view of this express restriction on the States, and the policy which dictated it—a State Statute providing that bank-bills shall be a legal-tender in payment and discharge of *future* contracts, is as unconstitutional, and, in consequence, as invalid, as a State Statute providing that bank-bills shall be a legal-tender in payment and discharge of *existing* contracts—and *vice versa*—Statutes of both descriptions are absolutely void.

(7.) That in the application of this express restriction upon State legislation, no well founded distinction can be drawn, between a State Statute which requires a debtor to accept payment in bank bills as a legal-tender—and one which allows any suit, which the creditor may prosecute to enforce the payment of his claim, to be defeated permanently and finally, by a set-off with bank-bills, pleaded, or given in evidence on the trial, by his debtor—both are *in effect*, tender-laws—both make the bank-bills receivable against the will of the creditor in satisfaction of a debt due to him by a third party—especially is such a law of set-off, a tender-law, when construed to give the right to the debtor to acquire bank-bills even after the creditor has recovered his judgment—and with them to set-off, or compensate. or discharge the judgment.

(*c.*) Let us apply these principles to the Ordinance of 23rd June, 1866. It enacts that— "in any suit, which may be brought, by any assignee "of a bank, it shall be lawful for the Defendant to set-off by plea or on "trial the bills of the bank." It certainly puts an end to the assignee's claim, if the Defendant shall tender him at the trial the amount thereof in the bills of the bank—it compels the assignee, against his will, to accept in discharge of his claim something which is not the legal currency of the United States. A debt does not cease to be a debt because it has been transferred to a new owner; it remains a debt still, either at law or in equity, due by the debtor to the assignee. If the assignee held the debt, originally due to the bank, at the time when the Ordinance was ratified, it will hardly be disputed that the Ordinance, in respect to *that* claim, makes something, which is not gold and silver coin, a tender in payment thereof,—is within the constutional prohibition,—and is therefore null and void. What reason can be suggested why it is not within the same constitutional prohibition, in its application to an assignee of a bank, to whom a debt, originally due to a bank, was transferred *after* its ratification ? It is true, the contract with the assignee in one case *existed* when the Ordinance was ratified, and in the other case it *arose afterwards.* But the prohibition of the constitution is equally absolute upon the States to make anything but gold and silver coin a tender in payment of *future* contracts, and *existing* contracts. The policy which dictated this absolute and universal restraint upon State legislation—to-wit: the securing, a *uniform* currency, to be used in *all* money transactions, *everywhere* within the United States, and a *uniform* standard of value, with reference to which *all* contracts within the Union, must be *made, construed, and discharged*—is equally invaded, whether the assignment was made *before* or *after* the ratification of the Ordinance. It is true, that the assignee who accepted the transfer *after* the Ordinance was ratified, *had notice,* that, *what purported to be,* a law of the State, required him to accept bank bills in discharge of the debt—and the assignee *before* the Ordinance was ratified had no such notice; and hence, I am prepared to grant, that—the constitutional inhibition apart—there would be much *hardship and injustice* in *enforcing* the Ordinance *against an existing assignee,* and none in *enforcing* it against a *future assignee.* But this much may be said for every State tender-law which is confined in its operation to *future* debts and contracts; it works no *hardship* or *injustice* to those who enter into contracts, or become creditors after its enactment, and with a full knowledge of its existence. Yet he would be a bold man, who, in the face of the constitutional inhibition, and the authorities already cited, should contend. that a State may enact a law that all debts *hereafter contracted* shall be solvable in bank-bills. In truth, whether a Statute in its application to any given case does or does not operate harshly and unjustly on private rights, has nothing to do with determining the question, whether it does or does not require creditors, against their will, to accept from debtors, in discharge of their debts, something which is not gold and silver coin. How can it have? If the Statute compels the creditor to accept in satisfaction of his debt *lands* of *twice* the intrinsic value of the money due thereon—or if it compels him to accept *paving stones* of *one tenth* the intrinsic value of the money due thereon—*equally*, in both cases, it makes something which is not gold and silver coin a tender in payment of the debt. *This* is the test of validity, under *this* constitutional inhibition upon the exercises of State power—and this alone—*does the Act make something which is not gold and silver coin a tender in payment of debts.* No argument can make the words used in the Constitution simpler or clearer.

Now, it is admitted, that this Ordinance, if valid, is unjust in its application to past assignees, and it is not unjust in its application to future assignees—and it is admitted, that in the case of a past assignee, the contract affected thereby, was in *existence* at the time when the Ordinance was ratified—and in the case of a future assignee, the contract affected thereby arose *after* it was ratified. But it is insisted, that these *distinctions* are the *only ones*, which the most astute intellect can suggest between the two cases; and that, with reference to the matter now under discussion, *they* make no *difference* between the two cases; because, in *both* cases, the fundamental question, that which tests the validity of the Ordinance, in its application thereto, is,—does the Ordinance purport to make some thing which is not gold and silver coin a tender in payment of a debt? Is there any thing in these distinctions which shows, that, in the application of the Ordinance to *one* of these cases, the *policy* of the constitution, to maintain unimpaired a *uniform* standard of value with which all contracts for *money* are to be discharged, *is* invaded, and in the *other* that it *is not?* Is the State encroachment, upon the *exclusive* constitutional power and right of the Federal Government, to coin money, and regulate the value thereof, and make *it* a legal-tender, and the *only* legal-tender, in payment of all debts—less in the one case, than in the other? If, in *these* respects, no distinction can be pointed out between the two cases—the State Act is equally unconstitutional and invalid in its application to either case. And hence I conclude that the *Ordinance* of 23d June, 1866, is equally without authority to compel *any* assignee of a bank debt, whether the transfer be *before* or *after* the passage of the Ordinance, to accept the bills of the bank in payment and discharge of the debt.

(*d.*) It may be urged, that a State has the power, under the Constitution of the United States, to enact a law requiring a *bank of issue* to receive its own bills in payment of debts due to *it*, whether such debts were contracted before or after the passage of the law—and also to subject a debt contracted with the bank, in the hands of an assignee, to set-off with such bills of the bank as the debtor held *at the time of the assignment*, or acquired afterwards, *before notice thereof;* and it will be asked, why, then, cannot a State,—taking care to leave inviolate the obligation of *existing* contracts, by confining the operation of the Statute to *future* assignments, and to restrict the right to set-off with the bills of *the* bank to which the debt was originally due—enact a law, subjecting a debt once due to a bank in the hands of an assignee, to the *same* mode of discharge *indefinitely*, without violating the restraint imposed upon her, by that clause of the Constitution of the United States which forbids her to make any thing but gold and silver coin a tender in payment of debts? To which I reply—the assumption, with which this query sets out, is perhaps broader than the law will warrant—after *Planters' Bank v. Sharp*, 6 How., 329; and *Bank of the State v. Bank of Cape Fear*, 13 Ired., 75—it may be doubted whether a State *has* the power to enact a law, requiring a bank of issue to accept its own bills in payment of debts, *due to it at the time when the law was enacted;* or, in payment of *any debt*, unless the Statute is part of the charter of the bank, or is in force before that charter is granted; but yielding this assumption, in all its breadth for the present—the constitutional power of a State in this respect over the regulation of off-sets is not confined to Banks of Issue; nor, when exercised with reference to such banks, or any other creditor, is it confined to the authority to require them to accept their *bills* in payment from their debtors; the State authority on this subject may be exerted to require *any* creditor to accept from his debtor in payment of the debt, *any other* of the creditors promises to pay *money* held by the debtor, or any other *debt* due by him, and owned by *the debtor when tendered in payment*. So, in the discussion of this matter, we may entirely put out of sight the fact, that the creditor *may be a bank of issue*, and the medium of payment or satisfaction of the debt *may be bank bills;* this is only an *accident* and not of the *essence* of the power. *But* a State *has* the constitutional power to authorize any debtor to satisfy his creditors claim, with a debt due him by such creditor, and to require the creditor to accept, his *own* indebtedness to his debtor, in payment and satisfaction of his claim. The exercise of this power by the States is common, and is only a regulation of the right of off-setting debts, in cases of *mutual* indebtedness; but, in cases of MUTUAL INDEBTEDNESS ONLY, can a State under the Constitution of the United States exercise such power. She cannot require A. to receive, in payment of a debt due him by B., a debt which he (A.) owes C. even if of double amount; nor can She compel A. to receive in payment of a debt due him by B. the wheat, or tobacco, or horse, or house, or land, even of B., and even though such property may be of twice the intrinsic value of the *money* due him by B.; nor can the State require A. to receive in payment of a debt due him by B. his, A.'s own contract with B. to deliver to him a specific chattel—certainly not before a breach of that contract, and probably not afterwards. And the reason why the State can exercise this power *in cases of mutual subsisting indebtedness* is—because where two persons are *mutually* indebted, each to the other, there is in *reality* and *natural equity*, but ONE DEBT DUE, *and that is the balance which results, upon stating the account between the parties, in favor of the larger creditor;* that *balance* constitutes the "*debt*" within the meaning of the Constitution, in payment of which a State cannot make anything but gold and silver coin a tender.

It is evident, that when a creditor has *completely* transferred his claim against his debtor to a third party, no *subsequent* acquisition by the debtor of a *claim against the assignor*, *can* create a case of *mutual indebtedness* between the *debtor* and the *assignee;* and it is only where there are *mutual subsisting debts*, between the two parties to whom the law is applicable, that the State *can* exercise this power of regulating the off setting of counter claims, without a violation of the constitutional inhibition against State tender-laws; and therefore a State Statute, which requires the assignee of a debt, to submit to have his claim against the debtor set-off, or compensated, or discharged, with the bills of the assignor, acquired by the debtor after the assignment, is *outside* the power of regulating the off setting of mutual debts, and compels the assignee to accept something—to-wit: a debt due by the assignor—which is not gold and silver coin, in payment of his debt; the transfer of the debt to the third party is *the very thing* which *destroys the relation* of creditor and debtor between the bank and the future bill-holder, the *existence* of *which relation at the time* the bills are held by the debtor, is essential to the exercise by the State of the power to require the bills to be accepted in payment of the debt.

On the same principles precisely, bank bills *held by the debtor at the moment of the assignment*, may by Statute be made a set-off to the debt in the hands of the assignee; in *natural equitg* the balance on an account *then* stated between the assignee and the debtor is the "*debt*" which is assigned—the "*debt*" to which the constitutional inhibition extends—and the bank-bills acquired by the debtor *after* the *contract* of assignment, and before notice thereof to the debtor, are *in law*, acquired *before* the *assignment* as to him: the assignment is not perfected until *notice* to the debtor, as between the debtor, and the assignor, or any party claiming under him. So that the constitutional power of the State—to enact laws compelling banks to receive their own bills in payment of debts due to them, and subjecting those debts in the hands of assignees to set-off with the bills of the banks respectively, held by their several debtors, at the moment of the perfected assignment—or acquired by them after the contract of assignment and before notice thereof, even when conceded, in its fullest extent—does not extend, to justify a statute,—which recognizing the power to transfer, and the actual transfer of the debt—compels the assignee to accept in payment, of, what has become, *his* claim, against the original debtor, the bills of the bank, acquired by such debtor after the assignment and notice thereof.

(*e*) But it is said,—parties *may contract* for payment in bank-bills if they see fit—and if, after a State Statute is enacted, requiring an assignee of a bank to accept payment of the assigned debt in the bills of the bank, a third party having notice of such Statute accepts the transfer of such a debt, *he makes it part of his agreement that he will accept payment in such bills*; and therefore, such a Statute is not prohibited by the clause of the Constitution of U. S. forbidding a State to make anything but gold and silver coin a tender in payment of debts.

It is true there is nothing in the Constitution of U. S. which forbids private persons to agree to receive bank-bills, in payment of their debts—it only forbids *the States* to *compel* creditors to receive bank-bills in payment, against their will and consent. But is the second proposition stated in this argument *true?* Is it not evident that, *he* who accepts the assignment of a debt originally contracted with a bank, after the enactment of such a Statute, DOES NOT *by* HIS *act* make it part of his agreement, that he will receive payment in bank-bills ? Giving to the Statute its full effect as a valid law—is it not apparent that it is the Statute—the Act of the State,— which inserts this condition in the contract of transfer, and makes it part of the agreement ? Is not the very thing done which the constitutional provision under consideration was designed to prevent ? Is not the uniformity of the Federal currency, the universality of the constitutional standard of value, invaded and destroyed by State action ! Is not the *exclusive* power of the National Government to prescribe what the citizens of the U. S. shall be compelled to receive as a legal-tender in payment of their debts, encroached upon by an Act of the State ?

But this method of argument begs the whole question at issue. It assumes that a State Statute of this description is a valid *law*. If it is a LAW IT imposes upon the contract of transfer, this condition, viz: that the transferee shall accept payment of the debt in the bills of the bank, BECAUSE IT IS THE LAW. If it is not a LAW it has no such effect. It is a perversion of language to say, that the *parties*, make this one of the terms of their *agreement*. But the very point we are arguing is, that such a Statute, *is not a law*, since by reason of the constitutional restraint upon the State Legislative power, it could not enact a *law* which makes bank-bills a legal-tender in payment of any debt. And if by the Supreme Law of the Land, no State Legislature can make such a LAW, how can a void enactment requiring the assignee of a bank to accept payment in its bills, impose conditions, not incorporated therein by the parties, on a contract of transfer, entered into after its passage ? The whole position is fallacious, and will not bear examination.

(*f*.) And finally it is objected:—That a State may, by legislative action restrain the transfer of debts *altogether*—and forbid their assignment either at law or in equity—whether they be debts already contracted, or debts thereafter to be contracted; and consequently, may *modify* the right of tranfer, by allowing it, only under certain circumstances; or by annexing certain conditions thereto; or by subjecting the debt when transferred to the condition that it shall be discharged by a tender to the assignee of bank-bills of the amount of the debt; and hence, may enact a law requiring debts contracted with a bank, in the hands of *its* assignees, to be discharged, on payment with its own bills. That such a law is in effect, but a *restraint upon the right of assignment*—and not such a *tender-law* as is prohibited by the Constitution of the U. S.

Can a State forbid absolutely the assignment of *existing* debts ? I venture to think it doubtful. Such a *chose in action* as a debt, is property. "Property is *every thing* which has *an exchangeable volue*, and the right of "property *includes the power to dispose of it according to the will of the* "*owner*." (*Slaughter House Cases*, 16. Wall. 127.) The XIV amendment of Constitution of U. S. ordains—that no State shall deprive any person of life, liberty, *or property without due process of law*. Again: Art. I, sec. 10, of the same Constitution forbids laws impairing the obligation of subsisting contracts. If a debt is assignable, either at Law or in Equity, at the time when it is contracted, it is questionable whether a law, depriving it of its assignable quality, does not impair the obligation of the contract. It has been held by this Court, that a Statute forbidding the "*transfer by endorsement or otherwise*" of a *negotiable note*, made before its passage, is obnoxious to the censure, that it impairs the obligation of the contract (*Planters Bank vs. Sharp*, 6. How. 301); and *Woodbury*, J., delivering the opinion of the Court therein—says, at p. 326—"the general "powers, which still exist under other governments, or might once "have prevailed here in the States, to change the tenure and right over "property, *and especially the* JUS DISPONENDI *of it*, cannot now, under "the Federal constitution, be exercised by our States to an extent affecting the obligation of contracts." But conceding this to the Defendant, for the purposes of the present argument—and undoubtedly a State may enact a law that any debt *thereafter* contracted shall not be assignable—does the right of a State to forbid, or to regulate the transfer of debts, authorize a law which proposes *as a means* to effect these ends, the making *bank-bills a tender in payment of the debts*, in the face of the constitutional provision that "no State shall make anything but gold and silver coin "a tender in payments of debts ?" Can a State constitutionally, accomplish an end or object, which she clearly has the right to accomplish in some way, by exercising, as a *means* to effect that end or object, a power, which she is absolutely, and universally restrained from exercising under the Constitution of U. S. ?

This same point was made for the State of Missouri, in the leading case of *Craig vs. Missouri* (4 Pet. 410); and was repudiated by *all* the members of this court, even by those who *dissented*, and by that dissenting *Judge* (*Johnson*), *who was most tenacious of the rights of the States.*

In that case the State of Missouri, with a view to relieve the supposed necessities of the times, authorized the establishment of certain *loan* offices, to *loan* certain sums to the citizens of that State, for which the borrowers were to give security by mortgage of real estate, or personal property, redeemable in a limited period by installments. The loans were to be made in *certificates*, issued by the Auditor and Treasurer of the State, of various denominations, between ten dollars and fifty cents, all of which, on their face, purported to be receivable at the treasury, or any of the loan-offices of the State, in the *discharge* of taxes, or debts due to the State for the sum of ——, with interest for the same at *two per centum per annum.* These certificates were also made receivable in payment of all salt at the Salt Springs; and by all public officers, civil and military, in discharge of their salaries and fees of office—and a fund for their ultimate redemption was provided.

The questions made were, whether these certificates were "*bills of credit*" within the meaning of that provision of the Constitution of the U. S., which forbids a State "*to emit bills of credit*"—and whether the issuing of them, under the above circumstances, was such an *emission of bills of credit by the State*—as was prohibited by the Constitution.

It was urged for the State of Missouri on the latter point—that she had a right to relieve the necessities of her citizens—to loan them money—and to borrow money to loan to them—and that the issuing of these *certificates* in the manner and under the circumstances above specified, was but a means or mode of executing these very powers which all must concede to her.

But this court held—a State could not relieve her citizens, or loan them money, or borrow money herself—*by emitting bills of credit*—by exercising a power expressly withheld from her by the Constitution of U. S. Not only is that judgment, as pronounced by Ch. J. *Marshall*, clear and explicit to this effect—but the grounds assumed by the dissenting judges confirm these principles.

And *Johnson*, J., says—(p. 441)—"Was this an emission of bills of "credit in the sense of the Constitution ! And here the difficulty which "presents itself is, to determine whether it was a loan, or an emission "of paper money; or perhaps *whether it was not an emission of paper* "*money under the disguise of a loan. There cannot be a doubt that this lat-*"*ter view of the subject must always be examined; for that which it is not per-*"*mitted to do directly, cannot be legalized by any change of names or forms.*" A State cannot exercise an unquestionable right, in a questionable form.

Numerous illustrations will suggest themselves—a State may encourage immigration, and the settlement and redemption from the wilderness of her uncultivated lands—but she may not do this by "*granting a* "*title of nobility*" to whoever will plant a colony in the wild district; because she is forbidden by the Constitution of U. S. to grant titles of nobility. A State may pay her debts—or encourage the influx of gold and silver money within her limits—but she cannot pass laws authorizing the coining of gold and silver money, to pay her debts, or to increase her metalic circulation; because the Constitution of U. S. prohibits a State from "*coining money.*" A State may *encourage*, as well as forbid, the entering into contracts, which she considers in conflict with the common weal, such as laws against excessive interest on the loan of money—but she cannot make a law that all contracts hereafter made for the loan of money, where more than six *per centum per annum* of interest is reserved, shall be *solvible in bank-bills*, as a legal tender equivalent to gold and silver coin of the same denominations; because the Constitution of the U. S. *forbids* her to *make anything but gold and silver coin a tender in payment of debts.* Finally a State cannot do *indirectly*, nor as a *means, real or pretend*, to accomplish what, it is perfectly constitutional for her to do in some other way—*anything* which she is expressly prohibited from doing by the Constitution of U. S.

It will no doubt be conceded to me, that a State Statute, providing, that bank-bills shall be a legal tender to discharge *all* contracts hereafter entered into within this State, is forbidden by the clause of the Constitution of U. S. now under discussion: It will be conceded that a Statute making bank-bills a legal-tender to discharge all future *contracts of a particular kind*—as all bonds, or all notes, or all agreements for the purchase of land—would come under a like condemnation. It will probably be yielded, that a Statute, which makes a tender of wheat or corn, at market prices, to the future assignees, a discharge of all future debts, which may be assigned by the original creditors, is not permitted by the Constitution. Perhaps, a Statute making a tender of *bank bills* in general, a discharge of any future debt, which may be assigned, it will be admitted, is obnoxious to the same constitutional censure; and possibly it may be also admitted—it certainly ought to be—that a Statute making a tender of corn, or wheat, or horses, or lands, to an assignee of a *Bank*, a discharge of a debt originally made with a bank, is a law which makes something that is not gold and silver coin a tender in payment of debts—whether they be the corn, or wheat, or horses, or lands of the bank, or of some other person. But there seems to be an idea, that there is some *magic* in the facts, that the debt was once due to a *Bank*, and the medium of tender and discharge is the *bills of that very bank*, or in these two facts combined, which enlarges the power of State Legislation, in the case of the N. C. Ordinance, and puts *it* without the constitutional prohibition. If there be such magic it is so subtle an essence as to escape detection by me.

A State may, if she see fit, in chartering a bank, forbid it to assign its debts, and then, in the exercise of the right of off-setting mutual debts, compel it to receive its own bills in payment of debts due to it—but she cannot, even in its charter, provide that it may assign its debts for every purpose and intent whatsoever save one—viz: that they shall be subject in the hands of the assignees to payment of its own bills; because, though this may be *called* a law restraining the right to assign debts, it is in *effect* and *fact* a tender-law, which compels the assignees to receive in payment of their claims bank-bills. It is *things*, not *names*, which the Constitution prohibits—it is *facts*, not *language*, with which the law deals. The object of the Constitution was to effect an end of national and commercial importance—to preserve the *uniformity* of the Federal currency—to prevent its *corruption* by *State agency*—to establish a *uniform standard* of value, with the representatives of which *all* debts could be solved; and this object, this policy, is defeated, whenever, by any State device, bank-bills are made a legal-tender to discharge *any* debt; whether it be in the guise of a law to restrain and limit the right of banks to assign their debts—except is so far as to leave them still solvible in the bills of the bank,—or in the shape of a law making all debts solvible in bank-bills.

(*g.*) My conclusion, therefore, is—that a State Statute or Ordinance, even if enacted before the transfer of a debt, enabling the debtor to pay it in the hands of the assignee, with the paper of the assignor, or with bank-bills, or with property real or personal, is repugnant to the Constitution of the United States—not because it impairs the obligation of a contract—not because it does a wrong to the assignee—but because, *it makes something which is not gold and silver coin a tender in payment of the debt.*

That no State can enact a law, that *all* debts, or all *bonds*, or all *notes*, or that *any class of debts*, or *any single* debt, contracted *after* its passage, shall be solvible in *bank bills*, or in *wheat*, or *cattle*, or *cloth*, or *land*, because, such a law *would make something which is not gold and silver coin a legal-tender*.

While the fullest power is conceded to the States to regulate the right of off-setting debts in cases of neutral indebtedness; while it is granted, that individuals, may contract, and even the State herself may contract in reference to her own taxes and other dues, to receive payment in bank-bills—and for the sale and delivery of bank-bills, as they may contract for the sale and delivery of corn, or cattle, or any other specific article; and that such contracts are perfectly lawful and constitutional; and while it is unhesitatingly admitted, that a State may enact a law, declaring, that no debt *thereafter contracted*, whether theretofore negotiable or not, shall be *assignable* either at Law or Equity. Yet – while the State laws *permit* the assignment of all debts, either at Law or in Equity, a Statute requiring all debts, or any debt, after they or it, are, or is so assigned, to be solvible, in the hands of the assignees or assignee, with something wich is not gold and silver coin—is repugnant to the Constitution of the U. S.—invalid and void.

Under the Constitution of the U. S., a State has no more power to make bank-bills a legal-tender in payment of debts, *after the debts are assigned*, than *before* they were assigned. There is no *magic* in the facts—*that, a debt was once due to a bank—that it has been assigned—that the thing with which the debtor proposes to pay is bank bills—that they are bills of the very bank to which the debt was once due*—when considered either singly, or combined—to take the case out of the general rule; change the Constitution of the United States; and enlarge the powers of the States, so that they may make something which is not gold and silver coin a tender in payment of debts.

The provision in the Constitution means what it says – that, no State shall make anything but gold and silver coin a tender in payment of debts—not that a State shall not do so, when by such action she impairs the obligation of contracts, and inflicts injustice on the creditors—that evil is guarded against in a separate and distinct clause; not that a State may do so, under the name of set-off, but not under the name of tender; not, that a State may do, as to one debt. or some debts, but not as to all; not that a State may do so as to debts in the hands of assignees, but as to debts in the hands of the original creditors, but a State shall not make anything but gold and silver coin a legal-tender in payment of *any* debts, by *any name, under any* circumstances. For the power to coin money and regulate the value thereof, and of foreign coin is conferred upon the United States; the powers to coin money, to emit bills of credit, to make anything but gold and silver coin a tender in payments of debts, are withheld from the States; the object in view, is to make the established representatives of the UNIFORM STANDARD OF VALUE created by the U. S., the ONLY *constitutional tender* in discharge of ANY DEBT. This policy, this great object of the constitution, is invaded, is defeated, whenever *any class* of debts, whenever *any* single debt, is made solvible, with ANY OTHER medium of exchange; the *uniformity* of the national currency, and the *universality* of the standard of value, applicable to *all* debts, as a common measure of value, a universal medium of exchange, a national instrument of commerce,—are at once destroyed.

And although it is not absolutely necessary to my argument, or my cause, to successfully maintain, in the connexion in which it is now offered, the constitutional invalidity of the Ordinance of the 23d June, 1866, on the ground that it makes bank-bills a legal-tender—since I am satisfied this Court will hold, that the Ordinance did not in any way affect the rights, which the Plaintiff acquired against the Defendant, when the Defendant's note was assigned to the Plaintiff by the Bank in November, 1866— on other grounds already presented—yet, I have argued this position at some length *here*, because if maintained successfully it *does* dispose of the Ordinance in its application to our case; but, more especially, for the reason, that the vice, here attributed to the Ordinance, infects alike it, and the Acts of the 17th of March, and 13th of December, 18(9, already quoted: which were enacted *after* the assignment in November, 18(6; and the constitutional invalidity of which, in their application to the Plaintiff's case, is of great moment, both to my argument and my cause

5. Now, if the Ordinance of 23rd June, 1866, did not embrace within its operation such assignees of a bank, as a Commissioner appointed under the Act of March 12th, 1866: or if it did, and did not extend the right of set-off with bank-bills, as against any assignee of a bank, to bank-bills acquired by the debtor after the assignee had obtained judgment against him; or if it embraced a Commissioner of a bank, and did extend the right of set-off with bank-bills, as against him, to bank-bills acquired by the debtor after the Commissioner had recovered judgment against him—and with this interpretation, is repugnant to the Constitution of U. S., because it makes bank-bills a legal-tender—in any or either of these events, it did not operate at the moment when Defendant's note was assigned to the Plaintiff in November, 1866, to reserve to the Defendant, the right, to acquire the bills of The Bank of Washington *after* the Plaintiff had recovered judgment againt him. and with them to satisfy the judgment. In other words, *at the time of the assignment*, the Defendant had no such right as *against the Plaintiff*—and if he has such right now, or had in the Spring of 1872, when the Superior Court of Beaufort County allowed it to him, it was in consequence ot something which transpired *after* the assignment.

IV.

Immediately after the assignment, then, the Plaintiff had a right, under the Constitution, and coinage and legal-tender laws of the United States, to require the Defendant to satisfy any judgment against him, which the Plaintiff might recover on his assigned note, with the lawful currency of the United States. The relative and respective rights and duties of the Plaintiff and Defendant remained unchanged by legislation, contract, or other event, until after the Plaintiff had recovered judgment against the Defendant, (in November, 1867), and sued out his execution to obtain satisfaction of the judgment. *Then*, for the first

2. We further insisted in the Supreme Court of North Carolina, as we insist now—that if these Acts are so construed as to affect past transactions—as to give the Defendant the right to pay the Plaintiff's judgment, with the bills of The Bank of Washington,—they will thereby be made repugnant to the Constitution of North Carolina—and to the Constitution of the United States; and that the Acts are fairly susceptible of another construction, confining them in their operation to *future* transactions, and consistent with both Constitutions; and that where an Act of a State Legislature admits of two interpretations, one of which brings it within, and the other presses it beyond, their constitutional authority, the judiciary will adopt the former construction; because a presumption ought never to be indulged that the Legislature meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced on the Court by language altogether unambiguous.

United States v. Coombs, 12 Pet., 76; *Sedberry v. Chatham Co.*, 66 N. C. Rep., 493.

3. We also insisted in the Supreme Court of North Carolina—as we insist now—that, if these Acts (of 17th March and 13th December, 1869) are so construed as to embrace within their operation, past as well as future judgments, recovered by past as well as future assignees, on notes originally made to a Bank—and are so interpreted as to extend the bank-debtors right of set-off, against such assignees, to bills of the bank, acquired by him after the assignment, at any time before his debt is actually satisfied by payment in money or sale under execution—yet, they can not be so construed, as to affect the rights against bank-debtors of that particular class of assignees known under the Act of 12th of March, 1866, as *Commissioners*, so far as those rights are conferred and defined by that Act itself. If by these statutes of 17th of March and 13th December, 1869, or any other legislation since the 12th of March, 1866, bank-debtors have conferred upon them, as against *all* other assignees of a bank, the right to acquire its bills, *after* the assignment of their debts was perfected, and to use those bills to set-off or satisfy their debts in the hands of such assignees—yet by none of said legislation is such right conferred *as against the Commissioner of a Bank* under the Act of the 12th of March, 1866.

The Plaintiff is the Commissioner of the Bank of Washington under the Act of 12th of March, 1866, and, in that capacity, has sued and recovered his judgment against the Defendant; the Defendant acquired the bills of that Bank, with which he proposes to set off and satisfy that judgment. *after* the Bank had surrendered its corporate existence, and all the debts, once due to it, and in existence at the time of its dissolution, including the Defendant's note, had become vested in the Plaintiff as such Commissioner, for the equal benefit of its late creditors, according to the provisions of said Act; that Act prescribes the right of set-off between the Commissioner of the Bank and those holding claims against its assets in his hands, and limits it to mutual credits and mutual debts *subsisting* between the Bank and such claimants *at the time when its dissolution took place*—when the Bank was yet in existence, and could owe a debt.

My position is, that the Defendant cannot set-off or satisfy the Plaintiff's judgment with the bills of the Bank of Washington *now* in his hands; because his note, made to the Bank, became vested in the Plaintiff, as Commissioner for the equal benefit of all the creditors of the Bank, under the Act of 12th of March, 1866, in November of that year; by the provisions of the Act, immediately thereupon the corporate existence of the Bank ceased, and these very bills, now held by the Defendant, in the hands of the then holder, were extinguished as debts due by the Bank, and became in the then holder's hands but evidence of his claim for his *quota* of the Bank's assets in the hands of the Commissioner; and this claim could be prosecuted against the Commissioner in no other court, in no other manner, and within none other time, than those specified and prescribed in the Act itself; *afterwards*, with all these characteristics and qualities impressed upon the bills, they were acquired by the Defendant; his assignor could transfer to him nothing more than such assignor himself held at the time of the transfer. Moreover the Act expressly limits the Defendant's right of set-off against the Commissioner, to claims against the bank held by him at the time when his note to the bank so became vested in the Plaintiff as Commissioner; and by no rule of construction, recognized by the courts, can the *general* words of these latter Statutes be interpreted to *modify* or *repeal* the *particular* provisions of the Acts of 12th of March, 1866—*clausular generalis non porrigitur ad ea quae specialiter sint comprehensa.* This rule of construction, I have already discussed, in considerating the operation of the Ordinance of 23rd June, 1866—on the Plaintiff's rights; it is unnecessary to repeat that discussion here—*Vide argument on the merits*, Div. III, subd. 1.

If I have sustained either of the three positions just argued, then I have demonstrated, that the Acts of the 17th March and 13th December, 1869, do not *when properly construed*, embrace our case within their operation; and do not even *purport* to confer on the Defendant the right to satisfy the Plaintiff's judgment, with bank-bills, and the Supreme Court of N. C. denied the Plaintiff his right, under the Constitution, and Coinage, and Legal-Tender Laws of the U. S., to have his judgment satisfied with the lawful currency of the U. S., *without even the poor excuse of an invalid and unconstitutional Act* of the *State Legislature, for their action.* And *one* of the grounds, upon which the intervention of this Court, in our case has been invoked, being that we claimed *a right under the Constitution and Laws of the U. S.—in the State* Court, *which was wrongfully denied us there*—this Court will interpret these State Statutes for themselves, and decide the questions just raised, as to whether these Acts do *purport even* to cover the Plaintiff's case.

Upon the Second Point. But the jurisdiction of this court has also been invoked in our behalf, upon the ground—that the State Court, declared these Acts to be valid and to embrace our case—notwithstanding we there insisted, and do now insist—that if extended to our case, they impaired the obligation of a subsisting contract, in which the Defendant was bound to the Plaintiff—and, in considering *this* branch of our case, the Court *here* will *assume* THAT interpretation of the Acts of March 17th and Dec. 15th, 1869, which was attributed to these Statutes by the State Court. The Supreme Court of N. C. *held*, that these Acts *did* embrace the Plaintiff's judgment within their operation; that the Defendant *had* the right to satisfy the Plaintiff's judgment with the Washington Bank-Bills which he had acquired after that judgment was rendered; that the *contract* between the Plaintiff and Defendant, upon which the judgment was recovered, when properly construed, *gave the Defendant this right*—and, therefore, the Acts were not repugnant to the Constitution of the U. S—since they did not enlarge the Defendant's rights under the contract, but only regulated the mode of enforcing and administering these rights.

Now when a case is brought here, from the court of last resort in a State, under the 2nd sec. of the Act of Feb. 5th, 1867, (*Stats. at Large*, Vol. 14, Ch. XXVIII, p. 386), upon the allegation, by the Plaintiff in Error, that a State Statute,—to which operation has been given by the State Court in that case—impairs the obligation of a subsisting contract with him; and the jurisdiction of this court appears on the face of the record; the ONLY question for this court, is—*Does the State Statute, as it was construed by the State Court in the case in hand*—(whether properly or improperly interpreted is of no moment)—*impair the obligation of the alleged contract, as it is found to be by this Court?* In other words—*does the State decision* MAKE *the Statute impair the obligation of the contract?* In our case the State Court *narrowed* the obligation of the contract by construing it into,—not an agreement of pay in *money*, but—an agreement to pay in *bank-bills;* and *enlarged* the operation of the Acts of the Legislature, by construing them to embrace, not only *judgments recovered by banks*, but also *judgments recovered by past, bona fide assignees of banks;* and after such *constriction* of the contract, and *expansion* of the Statutes, naturally *held*, that the effect of the Stautes, in our case, was not to impair the obligation of the Defendant's subsisting contract with the Plaintiff. If by so simple an *evasion*, the jurisdiction of this court is defeated, and the Plaintiff deprived of his right to redress here, then the clause in the Constitution of the U. S., forbidding State Laws which impair the obligation of contracts, is a dead letter—and the mode of redress, prescribed by the 2nd sec. of the Act of Feb. 5th, 1867, is a delusion and a snare.

In *Planters' Bank v. Sharp*—already so often cited—and *Baldwin et al. v. Payne et al.*—decided by this court at the same time—the Legislature of Mississippi had enacted a Statute, forbidding banks to assign their negotiable notes, and providing that *any suit*, brought on a note which had been assigned, should be abated on the plea of the Defendant. The State Court had held, that after a note had been *once* assigned, no suit could be sustained upon it, either in the name of the bank, or in the name of the *assignee*. It was insisted in this court, for the Defendant in Error, that the *proper construction* of the Mississippi Statute was, only to forbid suits *in the name of the assignee*—leaving the makers of the note still liable *on a suit brought by the bank;* and, that the obligation, of the contract evidenced by the note, was not impaired, because a way for redress was still left open *by the Statute;* that, *therefore*, it was not the *State Law* which impaired the obligation of the contract, but the *construction*, which the State Court had put upon it, and the *decision* made by the State Court. But this court did not agree to this argument, but held the question before them to be: Does the Statute *as it was construed and applied by the State Court in this case*, impair the obligation of the contract *as we find it to be?*

McLean J. says: "So far as the 7th section of the Act in question *has* "*been construed by the Supreme Court of Mississippi*, to invalidate the note "between the bank and the payee, it is unconstitutional. *The fair im-* "*port of the provision takes away only the negotiability of the instrument. But* "*the Courts of Mississippi have decided*, where a note has been assigned in "violation of the Statute, *that no suit* can be sustained on the note, eith- "er in the name of the assignee or the payee. ***This impairs the obligation*** "***of the contract***, which the Constitution inhibits." (6 How. 334).

Woodbury J., delivering the decision of this court in *Baldwin et al v. Payne et al.*, says: "*The State Court of Mississippi hold*, that the Legisla- "ture by the prohibitory law of 1840, not only meant to abate a suit in "the name of an indorsee, but in the name of the payee, if a transfer had "once been made. Substantially, *they consider* any suit on the note, by "anybody, after it has been once transferred as illegal, and the right to "enforce the contract to be lost or forfeited forever.

"*This view of the Statute of* 1840 *being regarded as established in Miss.*, "renders it clear, that in this case, as well as the case of *Planter's Bank* "*vs. Sharp*, the law under which this action has been abated must be "considered as having impaired the obligation of contracts, and there- "fore to be in this respect unconstitutional, and the judgment of the "State court erroneous." (6 How., 334.) In *Baldwin et al. vs. Payne et al.*—the suit was brought by an endorsee of the bank—in *Planter's Bank vs. Sharp*—it was brought by the Bank; and in this latter case—the same Judge, delivering the decision of this Court therein—says: "It is true "that this new law might bear a construction, that the transfer was "only a voidable act, and not void, and that, if cancelled or waived, a "recovery might afterwards be had on the note by the bank; and this "seems to have been the view of some of the court in 3 Smedes & Mar- "shall, 681, as well as in Hyde et al. vs. The Planter's Bank, 8 Robin-

"son, 421. Yet the State Court in Mississippi appears finally to have "thought it meant otherwise, and to have decided that no suit at all can "be sustained on such a note by anybody after a transfer. This was "the view which they think influenced the legislature. See Planter's "Bank vs. Sharp et al., 4 Smedes & Marshall, 28. We are disposed to "acquiesce in the correctness of this construction, as it seems to con- "form nearest to the real designs of the legislature. But this view is "not adopted, because the decision by a State Court on a State Statute, "though generally governing us, is to control here in the very cases "which, on account of that decision, are brought here by appeal or "writ of error.

"The rights of a party under a contract might improperly be narrow- "ed or denied by a State court, without any redress, if their decision on "the extent of them cannot be reviewed and overruled here in cases of "this kind; while their decision, if restricting or enlarging the prohib- "itory act, might more safely stand, as doing no injury in the end, if "we hold the act null, *wherever it is construed by them or us* so as to con- "flict with prior rights obtained under contracts"—(6 How., 326-327.)

It is also *possible*, that in considering the *first* ground upon which the jurisdiction of this Court has been invoked, your Honors may concur with the Supreme Court of N. C. in the construction to be given to the Acts of Genl. Assembly of the 17th March and 13th Dec., 1869; in which event, the consistency of those acts both with the Constitution of N. C., and the Constitution of U. S., is a proper matter to be argued *here*—and therefore—

OUR FINAL PROPOSITION IS, THAT THE ACTS OF 17TH OF MARCH, AND OF THE 13TH DECEMBER, 1869, WITH THE CONSTRUCTION ATTRIBUTED TO THEM BY THE SUPREME COURT OF N. C., IN THEIR APPLICATION TO THE PLAINTIFF'S CASE, ARE REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES, NULL AND VOID:

(*a*.) Because they deprive persons of their property without due process of law, and not by the law of the land; which is prohibited both by the Constitution of this State, and by the Constitution of the United States. Const. of N. C., Art. I, Sec 17; Const. of U. S., Art. 14, Sec 1.

(*b*) Because they impair the obligations of several contracts, which is prohibited by the Constitution of the the United States. Const. of U. S., Art. I, Sec. 10, Clause 1.

(*c*.) And because they make something which is not gold and silver coin a tender in payment of debts; which is also prohibited by the Constitution of the United States. Const. of U. S., Art. I, Sec. 10, Clause 1.

(1.) When the note upon which the judgment in this case was rendered, was transferred by the Bank to the Plaintiff in November 1866, he had the right to require the Defendant, the maker of the note, to pay it in lawful money of the United States. This right was the Plaintiff's *property*. No power resided anywhere in the State of North Carolina to make a law taking it away from *him* and *giving* it to *some other person*, arbitrarily designated by the law to receive the gift. So much is clear. The Constitution of North Carolina forbids such legislation; the Constitution of the United States prohibits a State from enacting any such law. Nor could the General Assembly of this State enact a law, requiring the Plaintiff to transfer his right, his property, to some other person arbitrarily selected to receive it, upon such person's tendering to the Plaintiff the nominal amount of his debt in the bills of some other bank not the Bank of Washington, whether such bank were solvent or not. Nor could the

General Assembly by law so require the Plaintiff to transfer his note to some person arbitrarily and indiscriminately selected, on the tender to him by such person of the nominal amount thereof in the bills of the Bank of Washington. Nor could the General Assembly enact a law requiring the Plaintiff to release to the Defendant his debt, as a gift, for no consideration at all; or upon the Defendant's tendering to him the nominal amount of the debt in the bills of some *other* bank. By what charm, what conjuration, and what mighty magic is it, then, that the Legislature can enact a law, *after the Plaintiff's right as assignee and Commissioner had accrued and become vested,* compelling him to surrender this right, this property, to the Defendant, on the tender to him by the Defendant, of the nominal amount of his claim in the worthless bank-bills of the Bank of Washington?

I presume it will not be even *suggested* for the Defendant, that the Legislature could enact a law compelling the Plaintiff to release the debt to him as a *gift* for no consideration whatever. I presume it will even be conceded, that no legislation could exact such release at the hands of the Plaintiff, upon the Defendant's paying him for it, the nominal amount of the debt, in the worthless and valueless bills of some other insolvent bank. But, in their repugnancy to constitutional prohibitions, in what respect do these Acts of 17th of March and 13th of December, 1869, construed as they were in this case in the Superior Court, and according to the *obiter dictum* of Mr. Justice Settle, in *Mann* v. *Blount,* differ from such laws as those just suggested? They take away from the Plaintiff all remedy which he had upon his right or debt, now merged in a judgment, and require him to rest satisfied with having had filed in Court for him, by his debtor, the nominal amount of his judgment in the bank-bills of The Bank of Washington: which bills are absolutely worthless, and were so when acquired by the Defendant at some time after November 1867. Apparently the Defendant did not purchase his bank-bills, until after the time had expired within which claims could be proved against the assets of the Bank in the hands of its commissioner, according to the provisions of the Act of 12th of March 1866; the ownership of them did not even entitle him to his proportionate share of the assets; *any* recovery of *anything* upon them was barred. I confess I am at a loss to divine by what show of argument it will be attempted to sustain the General Assembly in so ruthless a disregard of the Constitutional limitations imposed upon its power.

It is true the Plaintiff is but a naked *trustee*, and has no *beneficial* interest in the Defendant's note, and in the judgment in which it has been merged. But these Acts do not purport simply to divest him of his legal title, and to vest the property in some other trustee for the benefit of the same *cestuis que trust;* nor to transfer the legal title from the trustee to the *cestuis que trust*, in whom is the beneficial interest; they undertake to divest both *trustee* and *cestuis que trust*, in whom *together* is both the legal and beneficial interest, of their property, and to bestow it upon a third party. As soon as The Bank of Washington filed its Bill in Equity in November 1866, and the Plaintiff was appointed its Commissioner, and gave his bond as required by the Act of 12th of March 1866, the Defendant's note became vested in him, and *every* creditor of the Bank *instantly* acquired a *specific lien on that note*, and on all the other estate, property, and effects of the Bank in the hands of the Commissioner, for the payment of their respective debts, a *lien* as cogent and binding as if the property had been seized under execution to satisfy the debts—a *lien* constituting a *vested right* of which the holders could not be deprived by legislative enactment. (McKeithan v. Terry, 64 N. C. R., p. 25; Sluder v. Rogers, 64 N. C. R., p. 289). The fact that the person, to whom the property is given by the Acts, is or may be *one of the lien-holders*, does not purge them of their unconstitutional character; the Legislature could not bestow any part of the fund upon one of the claimants exclusively, in disregard of any rights which might exist in the others, (Cooley on Const. Lim. p. 105). The Plaintiff, though but a naked *trustee*, upon the facts disclosed in this case, and for all the purposes of this argument, is the representative of the general creditors of this Bank, in whom *is* the beneficial interest in the judgment which he has recovered against the Defendant. I can hardly anticipate that the Defendant will rest his case on so flimsy a pretext as this, of the want of beneficial interest in the Plaintiff.

As soon as the Defendant's note became vested in the Plaintiff, under the provisions of the Act of 12th of March 1866, in November of that year, a *contract* arose between them, that the Defendant would pay the Plaintiff, whether he be a naked trustee or not, the amount specified in the note, in lawful money of the United States, according to the tenor of the note. Do not these Acts impair the obligation of that contract? By them, the Plaintiff is compelled to receive the worthless bills of The Bank of Washington in payment. These Acts provide, in effect, that this contract shall be discharged by the payment of a different medium from that which the Constitution of the United States secures, and which the parties had in contemplation when the contract arose. Every creditor has the right to receive payment of his debt in gold and silver coin; such is the obligation of the debtor's contract; but the above Acts declare that the Plaintiff's debt may be paid in worthless bank-bills. If these laws had existed when the contract between the Plaintiff and Defendant arose, this objection to them would not lie; *they* would have entered into the contract and constituted a part of it; but as regards *past* transactions, they strike at *existing* contracts, and essentially impair their obligations; and therefore, in their effect upon *prior bona fide* assignments, they are unconstitutional and void. An Act which declared that all promissory notes, which had already been negotiated at the time of its passage, might be discharged by the makers with the notes of the promisees, would so clearly impair the obligation of the contracts to pay in gold and silver coin, that no one could doubt on the subject. Yet this, as regards debts due to a bank which had already been assigned before the enactment of the laws under discussion, is exactly the effect and meaning which is attributed to the Acts of 17th of March and 13th of December 1869 by the Superior Court in this case, and by the *dictum* in *Mann v. Blount.* The case of *Dundas v. Bowler* is so exactly in point, and so clearly reasoned by the court which decided it, that, though but a *nisi prius* decision, I cite it to your Honors. Dundas v. Bowler, 3 McLean C. C. R., p. 397.

But the suggestion is thrown out in *Mann* v. *Blount*, and perhaps will be repeated here, that the Plaintiff is only the *assignee in law* of the Defendant's note, and not a *bona fide purchaser for value;* and hence, it is intended to be *insinuated*, rather than alleged, that the Plaintiff's right is left open and subject to all future equities which may arise between the Bank and the Defendant, and that such equities may be set up in a suit brought by the Plaintiff to enforce his right, as they might have been in a suit brought by the Bank to enforce its right, and therefore the Plaintiff has no better right to demand gold and silver coin in payment of the Defendant's note, than the Bank would have had if it had continued to hold the note, and brought the suit to enforce its payment. As to so much of the suggestion as is *distinctly alleged*, it is true, but it is unimportant, it does not affect the questions of constitutional law under consideration; but as to so much as is *indirectly insinuated*, it is not law.

I admit that the Plaintiff is an *assignee at law* of the Defendant's note; that is to say, that he *has now* no higher or better right, as against the State Legislature, or as against the Defendant, than the Bank *had at the moment when it made the assignment.* The thing assigned was a *chose in action*, and — excepting negotiable paper transferred for value, by endorsement before maturity — every assignee of a *chose in action* is in North Carolina "*quasi*" an assignee in law, whether the assignment be for a valuable consideration, or by act of law, or for no consideration at all, by way of gift. Granted; the Plaintiff *is* an *assignee in law* of the Defendant's note; he acquired by the assignment no better or higher claim against the Defendant than the Bank had at the date of the assignment— *but he acquired the* SAME *right which the Bank* THEN *had against the Defendant* — no more, and certainly *no less*. Admit that the Plaintiff is *an assignee in law* — admit for the purposes of the question immediately in hand, that he is a bare gratuitous donee of the Defendant's note; under the State and Federal Constitutions, the General Assembly of North

Carolina cannot enact a law taking a man's property away from him because he inherited it, or it was devised to him, or came to him by legacy, or was *given* to him, without consideration by act *inter vivos*. I have yet to learn, that vested rights in property are any less sacredly guarded by constitutional inhibitions, because they are derived under sales at execution, or are held by assignees in bankruptcy or insolvency, or by administrators of deceased men, all instances of *assignees at law*. It would take a purchaser at execution-sales by surprise to be told that he was but an assignee at law, and therefore the Legislature could pass a law taking the property purchased away from him, and giving it back to the Defendant in the execution. I care not whether the Plaintiff in this case is a bare volunteer, or an assignee in law, or an assignee in fact. Whether he is one or the other, or either of the three, the General Assembly has no power to pass a law, impairing the obligations of an existing contract made with him; or a statute taking his property, his *chose in action*, his debt due to him by the Defendant away from him and giving it to the Defendant, or to any one else.

If this case disclosed the fact that the Defendant held his bank-bills of the Bank of Washington, at the *very time* when the Bank transferred his note to the Plaintiff, then the other fact, that the Plaintiff is only *an assignee in law*, might affect the decision to be pronounced herein by your Honors; but it is one of the agreed facts, that not only did the Defendant acquire his bank-bills, with which he proposes to satisfy the Plaintiff's judgment, *after* his note was assigned to the Plaintiff and he had notice thereof, but even *after* the Plaintiff had recovered his judgment against the Defendant on that note. Whether the Plaintiff is a bare volunteer, or an assignee in law, or an assignee in fact of the Defendant's note, can touch this case only in the event that *fraud* be established; or it be shown, that the Defendant had equities against the note in the hands of the Bank at the time of its transfer, or, at the same time, had legal or equitable claims or defences to defeat its collection by the bank; under such circumstances, the character in which the Plaintiff acquired the note, whether as volunteer or assignee in law, or assignee in fact for a valuable consideration, would affect the question. What right did the Plaintiff acquire by the transfer of the note to him? If the Plaintiff is a *bare volunteer*, the common law, or the Statute of Fraudulent Conveyances, or both, make the assignment to him fraudulent and void as against the creditors of the Bank. But the Defendant was not even a *creditor* of the Bank at the date of the assignment in November, 1866; he was only its debtor, that was the *only* relation which then existed between him and the Bank. Since the assignment, and since the Plaintiff recovered a judgment on his note, he has voluntarily made himself a creditor of the Bank as far as it was in his power to make himself the creditor of a dissolved and defunct corporation, by purchasing the outstanding bills of the Bank, and it is well settled law that the Plaintiff in this case is *not* a bare volunteer; the pre-existing debts, due by the Bank, the payment of which was secured by the legal transfer of the Bank's assets to him, were a sufficient considera, tion to prevent the Bank's assignment being fraudulent and void under the Statute of Fraudulent Conveyances. These debts will sustain the assignment of the Defendant's note to the Plaintiff as against creditors and purchasers, so far as its validity depends upon the *bona fides* and adequacy of the consideration on which it was executed. Jackson v. Hampton, 8 Ired., p. 457; Potts v. Blackwell, 3 Jones, Eq., p. 449; Ibid. vs. Ibid., 4 Jones, Eq , p. 58.

If the Plaintiff ~~as~~ is an *assignee in fact*, that is to say, if he is a *bona fide* purchaser *for value* of the Defendant's note to the Bank, *without notice* of any equities or defences which the Defendant had against its payment to the Bank, he takes the note discharged of such equities and defences. But he is not such an assignee; the note was assigned to him *after maturity*, as the case discloses, and that fact alone was *notice* of all *existing equities* between the Bank and the Defendant, if any such there were; but the case further discloses that the Defendant had no equities or defences against its payment to the Bank. Turner v. Beggarly, 11 Ired R., p. 331.

The Plaintiff is an *assignee in law* of the Defendant's note; that is to say, he acquired by the assignment of the Defendant's note to him by the Bank, in November 1866, only such right against the Defendant as the Bank *then* had, and could in equity and good conscience transfer to him, which is all that either law or equity will allow to pass by assignment *when the transfer* is the act of the law. Like an administrator, or an assignee in bankruptcy or insolvency, or a purchaser at execution-sale, or even a trustee or mortgagee, by Act *inter partes*, to secure *pre-existing* debts, the Plaintiff acquired, when the Defendant's note was assigned to him by the Bank in November 1866, the same *vested right* to require the Defendant to pay the amount of the note in gold and silver coin, which the Bank had *at the moment of the assignment*, which vested right was *property*, and subject to be defeated by *such equities and legal and equitable claims, defences and exceptions as the Defendant* THEN *had against the payment of the note to the Bank, and by none other.*

The proposition, that an assignee in law holds the property acquired under the assignment, subject to the *future* relations, contracts and equities, which may arise or be contracted between the former owner of the property and third parties, deserves to be noticed for its novelty. It has only to be applied to tangible property, as lands, and goods and chattels, to demonstrate its absurdity. Take the case of the purchaser of a horse at execution-sale: Your Honors would not for a moment entertain the proposition, that the Defendant in the execution could, on the day after the sale, as against the assignee in law, transfer the property in the horse to a third party; or execute a note to a third party to satisfy which the horse might be taken in execution; or that a third party might, by his own act, acquire some note of the defendant's, in the execution outstanding, on the day of execution-sale, and then seize the horse under execution to satisfy such note. Yet all this may be done according to law, if the above proposition can be maintained. Take another case, more like ours, of intangible property:—a promissory note, transferred to an assignee in bankruptcy, by an adjudication of bankruptcy against the holder. Can the bankrupt on the day after the adjudication, as against his assignee in law, transfer the note to a stranger? can he release it to the maker? can he execute a note to the maker and thereby create such relations between the maker and himself as will, by offset or otherwise, defeat the right of the assignee? And finally, which is our case, can the maker, of his own head, buy up an outstanding note of the bankrupt's, and so create after the assignment equities or relations between himself and the bankrupt, which will by set-off or otherwise defeat the right of the assignee to recover the amount of *his* note from *him* in gold and silver coin? I do not think the Defendant is prepared to answer any of these inquiries affirmatively; and taking the last, it is plain that the maker of the note to the bankrupt, having had no right or equity which qualified his duty to the bankrupt at the date of the assignment, still owes that whole duty to the assignee in law, and cannot vary it or diminish it by any act of his own; and he acquired by the purchase of an outstanding note of the bankrupt's, only the rights of the previous holder of that note, that is, the right to his proportionate part of the general assets in the hands of the assignee, upon proving his debt in the manner required by the bankrupt law. Now take the case before the Court: if the Bank had continued in existence after its assignment of the Defendant's note to the Plaintiff in November 1866, I presume it will be conceded that it could not, after that date, have contracted a *new* debt to the Defendant which would have impaired the Plaintiff's right to collect his note from him in gold and silver coin; I presume it will be conceded that even though the Bank had paid such debt to him in *new* bank-bills, the holding of such bank-bills by the Defendant would not have impaired the Plaintiff's right to collect his note from him in gold and silver coin; I presume it will be conceded, that by no combination which could have been made between them after the assignment, no, not even by the most explicit contract to that effect, could they have defeated the Plaintiff's right of recovery in gold and silver coin. I am curious to know how it is that the case is altered by the fact, that the intrigue is between the Defendant and another person who was a creditor of the Bank before its assignment. The Bank had no equity to defeat the Plaintiff's right — the Defendant had no such equity, the person from whom the Defendant acquired his bank-bills had no right to require the Plaintiff to satisfy his claim against the Bank's assets with the note of the Defendant, and yet that person by passing the bills to the Defendant can generate an equity which entirely defeats the Plaintiff's right as assignee in law to collect the Defendant's note from him in gold and silver coin. The position that the right of an assignee in law of a *chose in action*, against the debtor, is so frail and imperfect that it is liable to be defeated at any moment, by any claim which the debtor may acquire against the assignor, is simply preposterous. A right, which the party interested in defeating it may destroy at any moment he pleases, is no right at all. And yet, it has been said, that the Plaintiff in this case has no higher and better right to compel the Defendant to pay his note in gold and silver coin, after he has acquired the nominal value thereof in bank-bills of the Bank of Washington, than the Bank itself would have had, if *it* had continued to hold the note until the Defendant became the holder of the bank-bills!

I do not think the Court will sustain this *dictum*. The Plaintiff acquired by the assignment of the Defendant's note to him in November 1866, the right thereto of an assignee in law: that is to say, *the same vested right to require the Defendant to pay the amount of the note in gold and silver coin, which the Bank had* AT THE MOMENT OF THE ASSIGNMENT, *subject to such equities, and legal and equitable claims, defences, and exceptions as the Defendant* THEN *had against the payment of the note to the Bank,* AND TO NONE OTHER. At that time the Defendant had no equities against the note; he had no legal or equitable defences, claims, or exceptions against the Bank's right to demand immediate payment thereof in gold and silver coin. That right passed to the Plaintiff, by the assignment of the note, by the joint act of the Bank and the law, in November 1866, it was and is *property;* and the Constitutions, both of North Carolina and of the United States, forbid the General Assembly to pass a law to take it away from him and the general creditors of the Bank, whom he represents, and to give it to the Defendant, or to any one else, to any other creditor of the bank, or to the Defendant, whose relation to the Bank as creditor has only arisen by his own act, and since the Plaintiff's property was acquired. But if the General Assembly can pass a law requiring that any judgment which the Plaintiff has recovered or may recover to enforce his right to collect his debt, shall be satisfied and discharged, if the Defendant will pay the nominal amount of the judgment in worthless bank-bills of The Bank of Washington, it can deprive the Plaintiff and those whom he represents, of their property, *but not by the law of the land.*

Now what has happened *since* the assignment of the Defendant's note, by the Bank to the Plaintiff in November 1866, to enlarge the Constitutional power of the State Legislature, over the Defendant's property in that note? The Plaintiff has reduced his right to a judgment, but surely that cannot impair it. There is only one change, then, in the relative situation of the Bank, the Plaintiff, and the Defendant, each towards the others, which can be suggested: the Defendant has voluntarily made himself the creditor of the Bank, as far as was in his power, by the acquisition of its bills of the nominal value of the Plaintiff's judgment against him; but that fact can only affect the question of the Constitutional power of the State Legislature over the Plaintiff's property in the note, on the assumption, that the Plaintiff's right to collect the note from the Defendant in gold and silver coin was impaired so soon as the Defendant purchased his bank-bills; on the assumption that a *chose in action* in the hands of an *assignee in law*, continues, after the assignment, subject to the equities and claims which the debtor may acquire against the assignor; an assumption which is sustained neither by reason, nor precedent, nor authority, nor *dictum* even, saving and excepting only the *dictum* in *Mann* v. *Blount.*

A law requiring either directly or indirectly, an *existing* assignee of a *chose in action* once held by a Bank, to accept from his debtor the bills of that bank, acquired by the debtor subsequent to the assignment, in satisfaction and discharge of the debt, is not only retroactive in its operation, but it impairs the obligation of the contract which had arisen between the as-

signee and the debtor, compels the assignee to accept something which is not gold and silver coin, as a tender in payment of his debt, and deprives him of his property without due process of law, and not by the law of the land. These conclusions must inevitably follow, unless by some law *in force at the time of the assignment,* the right of the assignee was kept open, and subject to all future claims and equities which might arise, touching the thing assigned, between the assignee and the debtor, so that such claims and equities might be set up in a suit brought by the assignee to enforce his right, as they might have been in a suit brought by the assignor to enforce his; and if at the time when the assignment was made, some statute of the State required the assignee of a *chose in action* from a bank to allow in liquidation thereof a particular class of equities or claims which the debtor might thereafter acquire against the bank, if acquired by him within a specified time, or held by him under named circumstances, or tendered by him under cer-
tain conditions — any law, enacted after the assi er
altered, to the detriment of the assignee, the ch rs
claims, or the time within which they might b do en
the circumstances under which they might be he in
ditions under which they might be tendered, wou m
the same constitutional condemnation. nk

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the bank, or to the Defendant, whose relation to the Bank as creditor has only arisen by his own act, and since the Plaintiff's property was acquired. But if the General Assembly can pass a law requiring that any judgment which the Plaintiff has recovered or may recover to enforce his right to collect his debt, shall be satisfied and discharged, if the Defendant will pay the nominal amount of the judgment in worthless bank-bills of The Bank of Washington, it can deprive the Plaintiff and those whom he represents, of their property, *but not by the law of the land.*

Now what has happened *since* the assignment of the Defendant's note, by the Bank to the Plaintiff in November 1866, to enlarge the Constitutional power of the State Legislature, over the Defendant's property in that note? The Plaintiff has reduced his right to a judgment, but surely that cannot impair it. There is only one change, then, in the relative situation of the Bank, the Plaintiff, and the Defendant, each towards the others, which can be suggested: the Defendant has voluntarily made himself the creditor of the Bank, as far as was in his power, by the acquisition of its bills of the nominal value of the Plaintiff's judgment against him; but that fact can only affect the question of the Constitutional power of the State Legislature over the Plaintiff's property in the note, on the assumption, that the Plaintiff's right to collect the note from the Defendant in gold and silver coin was impaired so soon as the Defendant purchased his bank-bills; on the assumption that a *chose in action* in the hands of an *assignee in law*, continues, after the assignment, subject to the equities and claims which the debtor may acquire against the assignor; an assumption which is sustained neither by reason, nor precedent, nor authority, nor *dictum* even, saving and excepting only the *dictum* in *Mann* v. *Blount.*

A law requiring either directly or indirectly, an *existing* assignee of a *chose in action* once held by a Bank, to accept from his debtor the bills of that bank, acquired by the debtor subsequent to the assignment, in satisfaction and discharge of the debt, is not only retroactive in its operation, but it impairs the obligation of the contract which had arisen between the assignee and the debtor, compels the assignee to accept something which is not gold and silver coin, as a tender in payment of his debt, and deprives him of his property without due process of law, and not by the law of the land. These conclusions must inevitably follow, unless by some law *in force at the time of the assignment,* the right of the assignee was kept open, and subject to all future claims and equities which might arise, touching the thing assigned, between the assignee and the debtor, so that such claims and equities might be set up in a suit brought by the assignee to enforce his right, as they might have been in a suit brought by the assignor to enforce his; and if at the time when the assignment was made, some statute of the State required the assignee of a *chose in action* from a bank to allow in liquidation thereof a particular class of equities or claims which the debtor might thereafter acquire against the bank, if acquired by him within a specified time, or held by him under named circumstances, or tendered by him under certain conditions — any law, enacted after the assignment, which altered, to the detriment of the assignee, the character of the claims, or the time within which they might be acquired, or the circumstances under which they might be held, or the conditions under which they might be tendered, would come under the same constitutional condemnation.

(2). Now it is just here, in estimating the rights which pass to an *assignee in law*, that the *obiter dictum* of Settle, J., in the case of *Mann* vs. *Blount*, 65 N. C. R., p. 99, is erroneous. I do not question the decision of the Court in that case. The point decided was a question of practice. It was, that where a party to a pending suit or proceeding can obtain the redress which he claims in that suit or proceeding, he shall not be permitted to bring an original suit, and ~~involve~~ invoke the extraordinary remedy of injunction, to obtain the same redress. I admit this doctrine, and the propriety of the application of it to the particular facts disclosed in the case of *Mann* vs. *Blount.* But in announcing that decision, Settle, J., and not the Court, indulges in certain *obiter dicta,* which, if they can be sustained, are fatal to the position of the Plaintiff and appellant in the case now under discussion. I propose to examine these *obiter dicta*, and to point out wherein they are erroneous; and I announce, in advance, and as a guide to my meaning, that upon such examination, it will appear that the capital error upon which these *obiter dicta* rest, is an assumption, that the assignee in law of a *chose in action*, acquires no higher and better rights against the debtor — not than the assignor had *at the time of assignment*, but than the assignor would have had against the debtor, if he had continued to hold and own the *chose in action*, until the debtor acquired some claim against him, which qualified and altered his claim against the debtor. In other words, it is assumed by Settle, J., that a *chose in action* in the hands of an assignee in law, is affected, qualified, and altered, by the relations which originate and arise between the assignor and the debtor, subsequent to the assignment. Which position has no foundation in law or equity.

The Judge, commenting upon the Act of 1868-9, ch. 77, ratified 17th March 1869, and already cited, says: "The words "are broad enough to embrace the case under consideration," —a case like ours. Now to this proposition, as I have already argued, I ~~did~~ do not assent; but it is here assumed to be correct, for the purposes of this constitutional argument.

What next? The Judge goes on to state the position of the Defendant in that case, my position, the position of the Plaintiff in *this* case. "But it is contended, that the corporation "known as The Bank of Washington has had no legal existence since 1867, and that the debt upon which the execution, "which is now the subject of controversy, is founded, is not "due to The Bank of Washington; since all the property of "said Bank has been assigned to the Defendant, for the benefit "of such of the creditors of the bank as proved their debts. In other words, the *Defendant* in *that case* suggests that a debt due to the Commissioner of The Bank of Washington, is not a "*debt due to the Bank*," and therefore is not covered by the statute of 1868–9, ch. 77: and further, that if it is—and the Act does cover it under that general expression "*any debt due any bank*," such Act violates the Constitutions both of North Carolina and of the United States, because it takes part of the property to which those creditors of the Bank who shall prove their debts, are entitled *equally*, *pro rata*, and gives it to one of the creditors of the Bank who has not proved his debt; because, in so doing, it violates the obligations, at least impairs the obligations, of several contracts, and makes the valueless bank-bills of The Bank of Washington a tender in payment of debts.

Following the case of *Mann* vs. *Blount*. What is the Judge's reply? "We are unable to perceive how these facts can "affect either the justice or the law of the case."

And now for his reason why "*these facts* affect neither the justice nor the law of the case."

"*We are of opinion that the assignee and all who claim* "*under him, have no higher nor better rights than the bank itself* "*would have had*. The assignee is simply winding up the "affairs of the bank, and so far as its debtors are concerned, it "can make no difference whether the stockholders or the creditors are to be benefitted."

Now I freely admit that the commissioner of a bank, under the Act of 12th March 1866, is simply winding up its affairs under a law which provides for an equal *pro rata* distribution of its assets among such of its creditors as prove their debts, in accordance with the provisions of said Act; and it is a truism to assert, that it makes no difference to the *debtors* of the bank to whom the money goes, if they are compelled to pay their debts. But I am at a loss to see how both of these propositions taken together, or either considered separately, constitutes any reply to the positions taken by the *Defendant* in the case of *Mann* vs. *Blount*, and by the *Plaintiff* in our case.

Those positions are: That the Act of 1868–69, ch. 77, and the Act of 1869–70, ch. 4, which are nearly identical in the point now under consideration, ought not to be so construed as to make the words "*any debt due any bank*," include a debt due a bank originally, but which had *before the passage of these Acts* been assigned to a commissioner, under an Act of the General Assembly, for the benefit of such of the creditors of the bank as should prove their debts in accordance with the provisions of the Act; because the words "*any debt due any bank*," do not naturally include a debt once due the bank, but which has become *due an assignee of the bank,* before the words were used; and that such words ought not to be extended by construction to cover such a case, because by such extended construction, the property which had already vested in the assignee of the bank for the benefit of its general creditors equally, was divested and given to one creditor, who by failing to prove his debt in the manner prescribed by the Act, had lost his right to even his rateable distributive share of the general assets of the Bank in the hands of the Commissioner. That, moreover, if the said Acts of 1868–9 and 1869–70, must have such construction, and can bear no other, then that the Acts themselves are void, as being in contravention of the Constitutions both of the State and of the United States, since they take the property vested in the Commissioner of the Bank for the equal benefit of the general creditors, away from them, impair the obligations of contracts, and make something not gold and silver coin, a tender in payment of debts.

All our positions tend to this, that the construction given to the Act of 1868–69, ch. 77, by the *dicta* in *Mann* vs. *Blount,* works *as hardship and a wrong to the general creditors of the banks,* which *ought* to be avoided if possible; which *must* be avoided, since both the State and Federal Constitutions prohibit such wrong and hardship; and that part of the *dicta,* in the opinion in *Mann* vs. *Blount,* last quoted, and cited above, fails to notice the claim of the general creditors to consideration, comforts us with the assurance, that "the commissioner is simply "winding up the affairs of the bank," and that it will be quite as painful and inconvenient for the debtors of the bank, to pay their debts for the benefit of the creditors of the bank, as for the benefit of its stockholders, ignoring the fact that the *stockholders* have, in *natural equity* no right to enforce payment of a debt to the bank, from a *debtor who holds its bills,* for *their* benefit, because they are the very *persons who,* through the bank, *owe the* amount of such *bills* to the debtor. In short, this part of the *dicta* of Settle, J., says in effect: "The "Act of 1868–69, was remedial in its character, it was enacted "for the benefit of debtors to banks, thereby it was intended "to enable them to discharge their debts to the banks with "something that was not gold and silver coin—to wit: with the "depreciated bills of the bank; and we will carry out this "*policy* of the Act, even where a debt once due a bank has "now become due to some one else, and even though such a "construction of the Act divests vested rights and violates "the obligations of contracts; because if the debtors are com-"pelled to pay to any *one* in lawful money, it makes no dif-"ference to *them* who that one is, whether the bank itself, or "some third party." These propositions, enunciated in *Mann* vs. *Blount*, may *possibly be law*. I do not *think* that they are, but I *know* that they are no reply to the positions taken by the Defendant, in *Mann* vs. *Blount*.

But the keystone in this arch of error is to be found in that part of the *dicta* of Settle, J., already quoted, which immediately precedes the part we have just been considering, wherein it is announced: "*We are of opinion that the assignee "and all who claim under him, have no higher nor better rights "than the bank itself would have had.*" This position is indefinite and equivocal. I do not know that I distinctly understand it. I do not know that it conveys a very clear meaning. The word "*rights*" is used: now a "*right*" in one person, implies *a duty* in some other. It is a *relative term*. Does it, as here used, mean no higher or better rights *against the bank's debtor?* I think it does. The verb "HAVE" in the present tense, evidently refers to the present time, *now;* but the verb "*would have had*," to what *time* does it refer, to what *circumstances of condition* does it refer? I am at a loss to answer. Does it mean "than the Bank itself would have had, *if it had "continued to hold the chose in action assigned until now*," or "if it had continued to hold the *chose in action* assigned, *until the debtor acquired its bills*," or "if it had continued to hold the *chose in action* assigned, *until the Act of* 1868–69 *was passed by the General Assembly*"? I cannot tell. Perhaps the CONDITION under which the assertion is made, which is implied by the use of the word "*would*," has no reference whatever to the *continued ownership of the chose in action.* I admit I am fairly puzzled to understand the *exact meaning* of the foregoing sentence.

But, if it simply means to assert that a commissioner of a bank, under the Act of March 12th 1866, is only an *assignee in law* of its *choses in action,* and acquires no higher or better right against its debtor than the bank itself had, *at the time of the assignment,* I at once assent, it is the very proposition for which I am contending *i. e.:*— that the *defendant* in *Mann* v. *Blount,* and the *Plaintiff* in our case, took the note due the Bank, when it was assigned, subject to all the equities and legal defences and exceptions, which the debtor of the bank *then* had against it, in the hands of the bank. Our argument is that the debtor *then* had *no* equities against it, no legal exceptions or defences to its immediate enforcement in the hands of the bank; and after it became vested in the bank commissioner for the equal benefit of general creditors, the Legislature attempted to pass laws divesting it out of them, and giving it to some one else, by enabling the debtor to use *claims against the bank acquired after assignment,* to satisfy his assigned debt.

If, however, the foregoing quotation from *Mann vs. Blount* means to assert, as a general proposition of law, that *an assignee in law* of a *chose in action has no higher and better rights against the debtor, who has acquired a claim or debt against the assignor after the assignment and notice thereof, than such assignor would have had, if he had made no assignment, and had continued to hold the chose in action until his debtor acquired such claim or debt against him* — then I say, such position is utterly untenable, finds no support in law or reason, and the annals of the law will be searched in vain for any precedent, or authority, or *dictum* even, to sustain it.

If, yet again, the foregoing quotation means to assert that because the State of North Carolina had the power, under the Constitutions of North Carolina and of the United States, to enact a law, requiring a bank to accept its *own* bills in satisfaction and discharge of a note due to it; or to allow such bills as a set-off, in any suit which *it* might bring on such note, *therefore* the State could enact a law, *after a note once* held by a bank *had been assigned,* requiring the assignee of such note, to accept, in discharge thereof, the bills of the Bank; or to allow such bank-bills, as a set-off, without regard to the time when the debtor acquired them: if *this* is meant, I say the conclusion drawn is a clear *non sequitur*, and finds no support in the law.

The one case would be an exercise by the State of the right to pass a law regulating offsets, where there are mutual debts subsisting between the Plaintiff and Defendant. Such laws may be passed; they do not infringe that clause of the Constitution of the United States which forbids a State to pass a law to make anything but gold and silver coin a tender in payment of debts, or to impair the obligation of contracts. Why? Because where there are two parties, each owing a debt to the other of exactly the same amount; there is, in *reality and natural equity*, no debt due by either to the other; and where there are two parties, each owing a debt to the other, of different amounts, there is, in *reality and natural equity*, but *one* debt due, and that is, the debt due by the holder of the smaller claim to the holder of the larger, and is measured by the difference between the two original debts, which results after one debt is set against the other and a balance struck. An ordinary statute of set-off is but a *legal* recognition of this existing equitable fact, and a regulation of the mode in which the rights and liabilities of the respective parties are to be enforced, under such circumstances. U. S. v. Robertson, 5 Pet., p. 650, (Curtis' Dec., vol. 9, p. 518.) But when a note, originally made to a bank, against which there were no existing defences at the time of its assignment, has been assigned by the bank, and after the assignment, the Legislature attempts to enact a law, requiring the assignee of the note to accept in payment and discharge thereof, or to allow as offsets thereto, the bills of that bank, acquired by the maker of the note after the assignment, it is a bald and palpable effort, upon the part of the Legislature, to deprive the assignee of his property without due process of law; to impair the obligation of the existing contract between the assignee and the maker of the note, and to make something, not gold and silver coin, a tender in payment of the debt. Planters' Bank v. Sharp, 6 How., p. 301, (Curtis' Decisions, vol. 16, p.

691.) It is only by giving to the quotation from *Mann* vs. *Blount*, one or the other of the last two interpretations suggested, that we can make it any answer to the Defendant's positions in that case; it is fair to suppose that the Judge who delivered the opinion in that case, attached to it, one or the other, or both, of these meanings; and I think I have shown, that, so interpreted, the quotation is not law, and so the Defendant's positions in *Mann* vs. *Blount* remain unanswered.

So much for this case. I think I have removed it out of my way.

(3.) May it please your Honors, the Defendant's counsel will doubtless call the attention of this Court to the fact that the Defendant's note was assigned by the Bank of Washington to the Plaintiff in *November*, 1866, that there was *then* in force as part of the law of this State, the 22d section of the Ordinance of June 23d, 1866, (Ordinances of 1866, ch. 19, sec. 22, p. 36,) whereby it was provided: "That in an action brought " by any bank or * * * *any assignee of a bank*, it shall and may " be lawful for the Defendant to set-off by plea or on trial any " note of said bank, whether the same shall have been presented " for payment or not, any law or usage to the contrary not- " withstanding; but said plea of set-off, or set-off on trial, shall " not avail to carry costs against the plaintiff, unless there has " been a tender of such payment before suit brought." It will be urged, that these provisions of the Ordinance qualified the property in the note, the right against the Defendant which the Plaintiff acquired on its assignment to him by the bank, and entered into and constituted part of the contract which thereupon arose between the Plaintiff and Defendant, so as to leave with the Defendant the absolute right to discharge his note, in the hands of the Plaintiff, with the bills of The Bank of Washington purchased after the assignment. And it will be argued, that the Acts of 17th of March and 13th of December, 1869, are not repugnant to the provisions of either the State Constitution or the Federal Constitution; because they do not infringe upon any vested right which the Plaintiff acquired against the Defendant when the note was transferred to him, nor impair the obligation of any contract which then arose between the Plaintiff and Defendant, but only prescribe the method in which the Defendant may enforce against the Plaintiff a right which was reserved to *him* by the laws of this State, at the very time when the assignment was made, *i. e:* the right to discharge and pay off his note, in the hands of the Plaintiff, with the bills of The Bank of Washington.

This position is more specious than forcible. In the earlier part of this argument I have endeavored to show, and I hope and believe have shown, that the 22d section of the Ordinance does not embrace within its operation the case of an action brought by that peculiar general assignee of all the estate, property and effects of a bank, styled its *Commissioner;* whose office was created, name given, and rights and duties, in all respects and contingencies, specified and defined in the Act of 12th of March, 1866. Because by the express provisions of that Act, all the defunct bank's estate and property, including its *choses in action,* are held by the Commissioner, for an equal rateable distribution among all its creditors, without any preference being given to bill-holders; and the right of set-off, in suits between the Commissioner and debtors of the late bank, is expressly limited to claims which such debtors had against the bank at the moment of its dissolution, when the assignment is made to the commissioner. And the *general words* of the Ordinance applicable to any assignee in general, cannot be construed to repeal by implication these *particular, positive* and *specific* provisions of that Act, regulating the case of that *particular* and *peculiar* assignee of all a bank's estate and property, styled its *commissioner.* The rules of construction being *that all* statutes in *pari materia* are to be construed together, and effect given to the provisions of each and every statute if it be at all practicable; and in such construction, that *clausula generalis non porrigitur ad ea quæ specialiter sint comprehensa,* the Courts holding that a *general* provision in a later statute is never a repeal by implication of a *particular* provision in an earlier statute *in pari materia,* unless it be *absolutely necessary* to give the general provision such a construction, in order that it may have *any effect at all.*

I have further argued: that if the provisions of the Ordinance and of the Act of 12th of March 1866, are so flatly repugnant each to the other, that both laws cannot be executed, and we are forced to choose between them; *the provisions of the Ordinance must give way:* because, though the *Ordinance itself* is *posterior* in time to the Act, *the provisions of its 22d Section* are *prior* in time to the Act: since those provisions first appear in an Act of *10th of March* 1866; and it is evident *upon the face of the Ordinance,* that they were *republished* in its 22d Section, *only* to save them from *repeal,* along with the rest of the Act of 10th of March 1866, which Act was repealed as a whole, by the 23d Section of the same Ordinance.

If I have successfully maintained either of the above positions, just recapitulated, there is an end of this argument for the Defendant—since the Plaintiff acquired his note in the character of "The Commissioner of the Bank of Washington," under the Act of 12th of March 1866; and whatever rights the 22d Section of the Ordinance may have reserved to the Defendant, at the time of the assignment of his note, by the Bank, to *any other assignee, as against that assignee,* it reserved to him *no* rights as against the Plaintiff.

But if both of my positions are untenable, then a more serious question arises. The Ordinance was in force at the time when the Bank assigned the Defendant's note to the Plaintiff in November 1866, and so far as it is consistent with the Constitution of the State, and the Constitution of the United States, it was then part of the law of North Carolina, and controlled the effect of the transfer, and regulated the rights which the Plaintiff thereby acquired against the Defendant. The question is, what operation had it, on the right acquired by the Plaintiff against the Defendant, and the contract which arose between the Plaintiff and Defendant, when the Bank assigned the negotiable note, made to it by the Defendant previous to the promulgation of the Ordinance, to the Plaintiff, under the provisions of the Act of 12th of March 1866, in November of that year?

The Ordinance conferred no new right upon the assignee of a bank; the simplest form of the inquiry is, what new right did it grant to the maker of the note transferred, against the assignee? The right granted is to be asserted by *plea*, or in evidence on the *trial*, of an action brought against him by the assignee, *but not afterwards:* by implication, it is a more valuable right if asserted *before the action is brought*, for then the reassertion of the right by *plea*, or in evidence on *trial*, avails to carry the costs of the suit against the assignee. Of course, the *facts* which create the right and the *conditions* upon which it depends, must *exist before* the right can be asserted.

Now giving to the 22d section of the Ordinance the broadest interpretation possible to sustain the Defendant's argument, the utmost effect which can be attributed to it is, that it reserved to the Defendant the right, when his note was assigned to the Plaintiff, to acquire the bills of the Bank, even *after the assignment*, at any time before the *trial* of an action brought against him by the Plaintiff to enforce his right, and to tender them *before* or *at the trial*, to the Plaintiff, in satisfaction of his note, and in discharge of the Plaintiff's right. The fact that the Acts of 17th of March and 13th of December 1869, were enacted, is the strongest possible evidence that the *bills acquired after judgment* against him, could not avail him under the Ordinance: and even if *acquired before trial*, they would not avail him, unless *tendered in evidence* at the trial. The contract, therefore, which arose between the Plaintiff and Defendant, on the assignment of the note in November 1866, was that the Defendant would pay the Plaintiff the amount thereof, in lawful money of the United States, according to the tenor of the note, unless before he reduced his claim to a judgment, the Defendant should tender him the nominal amount thereof in the bills of the Bank; and the right which the Plaintiff acquired against the Defendant, by the assignment, was the right to compel the Defendant to pay the amount of the note in gold and silver coin, unless the Defendant paid to him the nominal amount thereof in the bills of the Bank, before he could sue the Defendant and recover a judgment. The contract which arose between the Plaintiff and Defendant, was not so valuable a one to the Plaintiff as would have arisen, if the assignment had been made *before* the Ordinance was in force, because it was subject to a condition which *might* defeat it altogether; but the Legislature had no power to impair the obligation of that contract, such as it was; and it had no more power to extend the *time*, and alter the *conditions* under which a tender in bills of the Bank of Washington was to work a discharge of the obligation of the contract, than it had to declare the contract discharged, upon the tender of the bills of some other bank, or of *half* the amount of the note in gold and silver coin, or of its own arbitrary will, upon no condition whatever imposed upon the Defendant. The vested right, the property which the Plaintiff acquired by the assignment, was not so valuable as that would have been which he would have acquired, if the note had been assigned to him before the Ordinance was in force, because it was encumbered with a condition, and subject to a *contingent* defence, *which might* arise for the Defendant, *at any time before the Plaintiff obtained a judgment* to enforce his right. But subject to this incumbrance — to this contingent defence — the Plaintiff held a *vested right*, which was property, which could not be taken away from him by State legislation, either wholly, or in part: either directly, by requiring him to release and surrender it to the Defendant, or indirectly, by changing to his prejudice the character or amount of the incumbrance, or the time within which, or the circumstances or conditions under which, the acquisition and tender of the bank-bills, by the Defendant, should discharge his right and destroy his property.

Now what do these Acts of the 17th of March and 13th of December 1869, propose to do? They extend the time within which the Defendant may discharge his debt to the Plaintiff with the bills of the Bank, by allowing him to tender them in satisfaction at any time *after* judgment, and *before* the judgment is *actually paid* with lawful money of the United States, or *satisfied* by a sale of the Defendant's property under execution. If while the Plaintiff's right was yet subject to a contingent defence which might defeat it; if while it was yet possible for the Defendant to have performed the condition, which would have destroyed the obligation of the contract under which he was held to the Plaintiff, these statutes had been enacted, they would have been gross invasions of the Plaintiff's rights, in reckless disregard of the constitutional inhibitions on the exercise of legislative power by the State. But what are the facts of this case?

Before these Statutes of 17th of March and 13th of December 1869 were enacted, the performance, by the Defendant, of the condition imposed by the Ordinance on the Plaintiff, and which would have destroyed the obligation of the contract under which the Defendant was held to the Plaintiff, had ceased to be possible: the contingent defence, against the Plaintiff's right to have payment from the Defendant in gold and silver coin, was no longer available to the Defendant: the time within which the bank-bills, if acquired and set-off by the Defendant, would have discharged and defeated the Plaintiff's claim, had passed: the Plaintiff had brought suit upon the Defendant's note, the suit had been *tried*, and the Plaintiff's claim against the Defendant had become merged in a judgment. After this judgment was rendered, the Plaintiff's right, thus perfected, was subject to no contingency which might defeat it; it had become a *perfect*, *vested*, *unconditional right*, to require the Defendant to pay him the amount of the judgment in gold and silver coin: and the obligation of the Defendant's contract with the Plaintiff was to pay him *absolutely* and *unconditionally* the amount of the judgment in gold and silver coin. The Plaintiff's right against the Defendant, the obligation of the Defendant's contract with the Plaintiff, became thus perfect in November 1867. Then the Plaintiff recovered his judgment, and sued out his execution, which established a lien on all the Defendant's estate and property, real and personal: and *afterwards* the Defendant obtained his bank-bills; and *afterwards* the General Assembly of North Carolina, on the 17th day of March 1869, enacted one statute, and on the 13th day of December 1869 enacted another, requiring the Plaintiff to accept in satisfaction and discharge of this right, in exchange for his property, the worthless bills of The Bank of Washington, of the nominal amount of the judgment, in the hands of the Defendant. It is hardly possible to conceive of a plainer and clearer case of enactments impairing the obligation of a contract, enactments making something not gold and silver coin a tender in payment of a debt, enactments which deprive a man of his property without due process of law.

(4.) May it please your Honors, the assigned *chose in action*, upon which the Plaintiff's judgment in this case was recovered, is a *negotiable promissory note*, originally payable to The Bank of Washington *or order*, made *previous to the* 1*st day of May*, 1865; and consequently *in existence*, and held by the Bank, before and at the time when the Ordinance of 23d of June, 1866, was ratified. The 22d section of the Ordinance, far from aiding the Defendant in this case, is *itself* open to the objection, that it is repugnant to those provisions of the Constitution of the United States, which forbid a State to enact a law impairing the obligation of contracts, or to make anything but gold and silver coin a tender in payment of debts, when construed to cover the case of even a *future* assignee of *a negotiable note in existence and held by a bank at the time when the Ordinance was ratified.* The 22d section of the Ordinance proposes to impair the obligation of the existing *contract which arose between the Bank and the Defendant at the moment when he executed his note to the Bank;* and the Acts of March 17th, and December 13th, 1869, if construed and interpreted as the Defendant would have them, are both liable to the same objection. Any law which attempts to destroy or diminish the negotiability of an existing promissory note, is a law impairing the obligations of contracts, and comes within the constitutional condemnation; because by the law of the State, and by the express agreement of the payer when the note was made, it was part of his contract with the payee that the note should be negotiable, and that he would pay the amount of the note in gold and silver coin to any assignee to whom the payee might assign it.

What was the character and scope of the contract entered into by the Defendant with the Bank when the note in this case was made? It is not pretended there was any law in North Carolina when this note was taken by the Bank, which prohibited its transfer, or which required the assignee thereof, under any circumstances, to receive payment in the bills of the Bank. I am not inquiring what law existed on this point when the note was transferred, but what was the law when it was *made*, and when its obligations as a contract were fixed? By the general law of the State, *then* allowing transfers of negotiable paper, and suits in the name of the assignee, and a recovery by him of lawful money, in payment and discharge as well as by the express terms of the Defendant's note to the Bank, the contract entered into by the Defendant with the Bank, when it was executed, enabled the Bank to sell or assign the note, and the assignee to collect it in money, by suit in his own name.

In this condition of things, with this note taken and held by the Bank, accompanied by such rights and obligations, the legislative power of North Carolina made, ordained and enacted the ordinance and statutes already cited, and now under discussion. It is true they do not *expressly* take away the right of the Bank to transfer the note, secured to it by the Defendant's contract, but they clog and embarrass this right with a condition which makes it valueless or *at least impairs its value* by making the note when transferred, liable, in the hands of the assignee, to be discharged with the bills of the Bank; they virtually deprive the assignee of any right to recover *money* in payment of the note,.and compel him to take something which is not gold and silver coin, in discharge of his debt. These new laws confer on the Defendant, the maker of the note, a *new right* to defeat any action brought against him by the assignee thereof, to which action he would otherwise have been liable. These laws, by procuring such results, virtually changed the obligation under which the Defendant lay, by his contract with the Bank, to pay its assignee the amount of the note in money. When every form of redress on a contract is thus taken away, it is difficult to see how the obligation of it is not impaired. In the mildest view which can be taken of such legislation, a new disability is attached to an old contract, and its original value and usefulness restricted, and this of course *impairs* its obligation. *Its value has been diminished by State legislation.* This is the test, whether the obligation of a contract has been impaired by an Act of the

Legislature. By the Constitution of the United States, the State is forbidden to impair the obligation of the contract *at all*. The question is not one of degree, or manner, or cause, but of encroaching in any respect on the obligation of a contract, of dispensing with any part of its force. The obligation of a contract, is the duty which it imposes on the maker of it; but here the duty of the Defendant, the maker of the note, to make payment thereof to the assignee of the bank *in money*, which duty he assumed by his own contract with the bank, is interfered with, altered, annulled.

The case of *The Planters' Bank v. Sharp*, is an express decision, by the Supreme Court of the United States, that a State statute, which prohibits the transfer of negotiable paper made before its enactment, violates the Constitution of the United States, by impairing the obligation of the existing contract between the maker and the payee of the note.

The facts of that case were: That in 1830 the Legislature of Mississippi passed an Act, entitled "An Act to establish a Planters' Bank in the State of Mississippi," by which, among other things, the bank was authorized to receive, retain, and enjoy its property of every kind, and to grant demise, alien, and dispose of the same. In 1840 the Legislature of Mississippi enacted another statute, requiring all the banks of the State to receive their own bills, in payment and discharge of any and all debts due them; and within two days thereafter, yet another statute, declaring that it should not be lawful for any bank in the State to transfer, by endorsement or otherwise, any note or bill receivable, and if an action was brought on any note or bill so transferred, the same should be abated. The Supreme Court of the United States held, in suits brought by assignees of negotiable notes, whose assignments were *subsequent* to these statutes, that the obligation in the contract between the State and the bank was, that the bank should have power to transfer and assign its property; that the contract between the bank and the signers of its notes was, that they should be paid in the hands of the assignee; and that the Act of 1840, by abating the suit, and thus destroying all remedy on the note in suit, impaired the obligations of both contracts, and the Act was held void. Planters' Bank vs. Sharp, 6 How. p. 301; (Curtis' Decisions of Spm. Court, vol. 16, p. 697).

Through some inadvertence in settling the agreed facts in this case, the private Act creating The Bank of Washington has been omitted; and I therefore do not dwell upon the second objection of the Mississippi legislation, sustained by the Supreme Court of the United States, in the above case. I preume this Court will not notice the provisions of the charter of The Bank of Washington.

But in what material respect does our case differ from the one I have just cited? In what material particular does the 22d section of the North Carolina Ordinance of 1866, vary from the Mississippi Acts of 1840, which were condemned by the Supreme Court of the United States, in Planters' Bank v. Sharp? It is true that neither the Ordinance, nor the Acts of March 17th and December 13th, 1869, declare that it shall not be lawful for the Bank of Washington to transfer the Defendant's note, by endorsement or otherwise; nor does any of this legislation say that any suit brought by an assignee of such note shall be abated; but all this legislation quite as effectually impairs the obligation of the Defendant's contract with the Bank, and enacts what is quite as repugnant to the Constitution of the United States.

The Bank of Washington held the Defendant's note; the contract between the Bank and the Defendant was, that it should be paid in money in the hands of the Bank's assignee; the 22d section of the Ordinance of 1866 ordained that in any suit brought on the note by the Bank's assignee, the Defendant might set-off the note with the bills of the Bank acquired and tendered at any time before trial, and thus defeat the assignee's right to payment in money. The bills of The Bank of Washington were below *par*, greatly depreciated; but, *in principle*, this fact makes no difference; under the Constitution of the United States, the State of North Carolina had exactly the *same* right, power and authority to allow the Defendant to set-off the note, if assigned with the bills of an insolvent, as of a solvent bank — no more, and certainly *no* *less.* Any enactment by the State, the effect of which was to enable the Defendant to permanently defeat the assignee's action on the note, by tendering him something of the same value as the debt, but not the money which he had promised the bank to pay its assignee; by tendering him a less sum of money than he promised the bank to pay its assignee; by tendering him in depreciated bank-bills, the nominal amount which he promised the bank to pay its assignee in money; by tendering him in the bank's promises to pay the exact amount he had contracted with the bank to pay its assignee in money: the allowance of any or all, or either of these defences, as certainly and clearly impaired the obligation of the Defendant's contract with the bank, made by signing and delivering his negotiable note to the bank, to pay the amount thereof to its assignee in *money,* as if the State had arbitrarily ordained that the note in the hands of an assignee should not be paid by the Defendant at all, and that no suit should be brought or maintained by such assignee, to collect the contents of said note, in any court of the State.

With this Ordinance, however, *apparently* in force, the Bank assigned the Defendant's note to the Plaintiff, in November 1866, in accordance with the provisions of the Act of 12th of March of that year, as commissioner, for the equal benefit of all its creditors, who should prove their debts as provided in the Act. The Plaintiff, in the performance of his trust, brought suit against the Defendant to collect the amount of the note, in his own name as commissioner. The Defendant failed to avail himself of the new defence granted him by the 22nd section of the Ordinance, by purchasing the bills of the Bank before trial, and tendering them in satisfaction before or at the trial. And in November 1867, the Plaintiff recovered a judgment against the Defendant on the note for its full amount in money. And then the General Assembly enacted the statutes of the 17th of March and 13th of December 1869, impairing the obligation not only of the judgment—not only of the contract which had arisen between the Plaintiff and Defendant, at the date of the assignment, but also of the contract which the Defendant had made with the Bank, when he executed his note, that he would pay the amount thereof to the assignee of the Bank in money, and discharging the Defendant entirely from the obligations imposed on him, by each and every of these contracts, upon his procuring and tendering to the Plaintiff the worthless bills of The Bank of Washington, of the nominal value of the amount of the judgment. If these Acts do not impair the obligations of all these *three* contracts, if they do not make something which is not gold and silver coin a tender in payment of debts, then I find it impossible to conceive of statutes which come under this condemnation.

(5.) May it please your Honors, there was in existence yet another contract, when the Acts of 17th of March and 13th of December 1869, were passed by the General Assembly, the obligation of which the provisions of these statutes, if applicable to the facts of this case, purport to impair. I speak of the contract which had been perfected between the State and the stockholders of The Bank of Washington in November, 1866, when they surrendered their charter and franchise to the State, and all their estate, property and effects, including the Defendant's note, to the Plaintiff, or rather into the custody of the law, for equal rateable distribution among all their creditors. The *proposition* of the General Assembly to the banks of the State, contained in the Act of 12th of March, 1866, *when accepted* by the stockholders of The Bank of Washington in November of that year, by a surrender of their chartered rights to the State, and of the Bank's assets to a Commissioner, in the manner prescribed by that Act, *created a valid and binding contract by the State for a valuable consideration with the stockholders*, to allow such assets to be held, distributed, and in all respects regulated and disposed of, in the manner specified in said Act. Even supposing the provisions of the 22d section of the Ordinance of June 23d, 1866, to have already, at the date of the surrender, modified the provisions and terms of the State's proposition to the banks, it does not affect the argument: the State was yet bound by the terms of her contract with the stockholders of the Bank, to make no future, further modifications of the existing law, which would touch or affect any rights or interests which arose, or became vested out of, or under the surrender. After the surrender by the stockholders of their charter and property, the State lost all right to repeal or modify the existing laws, under which that surrender was made, so as in any manner to affect or change the disposition and distribution of the Bank's estate, property, and effects, or any part thereof, in the hands of its Commissioner.

Ever since the case of *Fletcher v. Peck*, and the *Dartmouth College* case, it has been well settled law, that a statute enacted by a State may be a contract binding the State; and whenever a statute is in the nature of a contract or grant, and absolute rights have arisen or become vested under that contract or grant, the State has no power to destroy or divert those rights by repealing or modifying the provisions of the statute. All private rights of property created by such a statute are within the protection of that provision of the Constitution of the United States, which forbids a State to pass a law impairing the obligation of contracts. Under the Constitution, a State can no more impair, by legislation, the obligation of her own legislative contracts, than she can impair the obligation of the contracts entered into by individuals. We naturally look to the action of a sovereign State to be characterized by a *more* scrupulous regard to justice, and a *higher* morality, than belong to the ordinary transactions of individuals. The decided cases establishing these principles are collected and commented on in Sedgwick on Stats., &c., pp. 618 *et seq.*

Now in our case the State had no right, by legislative enactment, to destroy the Bank's charter, or to seize upon and distribute its estate and property: she made no such attempt. The Act of 12th of March 1866 does not *require* the banks of the State to surrender their respective charters, and to go into liquidation under its provisions. It *allows* and invites such a course. After reciting in the preamble, that for certain reasons therein stated, it is absolutely necessary that the banks shall close their business, and that a further continuance of their corporate existence is idle and useless to the people of the State, it enacts in its first section: "That if *the stockhold-*" *ers* of any of the banks, chartered by the General Assembly "of this State, shall be unwilling to close the business of their

" banks by an assignment, *and are desirous to appropriate all* " *the estate and effects of such bank for the benefit of its creditors,* " *and to close its business, and to surrender their chartered rights* " *and franchises in conformity with the subsequent provisions of* " *this Act, such stockholders* MAY, *by their bill in Equity, in* " *the name of such bank, filed in the Court of Equity of the* " *county in which the principal bank or some of its branches* " *may be located, require the creditors of such bank to prefer* " *and establish their demands within such time* (*not less than twelve* " *months after decree therefor*) *as shall be allowed by the Court.* " The Court shall, &c., &c. * * * * ". And the subsequent parts of the Act provide, in effect, that the filing of the bill in equity shall be a surrender of their charter, and vest all the bank's " estate, effects, and rights of action, * * * " including all debts due to such bank, or to any person for " its use," in a commissioner, appointed by the Court, for the equal benefit of all its creditors, who shall prefer and prove their claims in the manner provided in said Act; and that in any suit wherein such commissioner is a party, plaintiff, or defendant, and there are mutual credits or mutual debts between the bank and the person who is the opposite party, the account between the parties shall be stated, and the balance of such account only shall be allowed or paid on either side respectively. It provides further, the time, place, and manner, for the proof of claims against the commissioner, and prohibits the allowance of all claims not preferred as therein directed, and directs a distribution of the fund in the commissioner's hands, by him, among such claimants, according to the order of the Court.

With this Act in force, the stockholders of The Bank of Washington, in November 1866, filed their bill in Equity, in the Court of Equity for the county of Beaufort, in exact accordance with the requirements of the Act, and thereby surrendered their charter to the State, and all the estate, property, and effects of the Bank, including the Defendant's note, into the hands of the Plaintiff, the Commissioner appointed by the Court and acting under its control and guidance, for the purposes and upon the trusts set out in that Act; that is to say, for equal rateable distribution among all the Bank's creditors who should prefer and prove their claims in the manner provided in the Act, without any priorities or preferences secured to any.

This proposition of the State, thus accepted and acted upon by the stockholders of The Bank of Washington, before the General Assembly had notified the public, by any new enactments of its withdrawal, or of any change in its terms, did then and there constitute *a contract by the State, on good and valuable consideration, with the stockholders of The Bank of Washington, that the assets of the late Bank, including the Defendant's note, should be held and disposed of in the manner provided by the existing law, and equally and rateably distributed among all its creditors without preference or priority given to any bill-holder.* And such a contract was binding on the State, and within the protection of the Constitution of the United States. It is true the State had, and has, at any time the right to withdraw her proposal to the banks, or to qualify and alter its terms, by legislation; but it is equally true, that she must do so in such a manner as not to impair the obligation of any contracts which have arisen by the acceptance of her proposal. Woodruff v. Trapnall, 10 How., p. 190; (Curtis' Decisions, vol. 18, p. 358); Furman v. Nichol, 8 Wall., p. 44.

But with this contract subsisting between the State and the stockholders of The Bank of Washington, after the time had elapsed, within which *any* creditor must prefer and prove his claim against the Bank's assets in the hands of the Commissioner, or be forever barred of recovering even his *quota*, according to the express terms of the Act of 12th of March 1866, after the Defendant, with a full knowledge of the existing law, had attempted to make himself a claimant against the assets, by procuring worthless rags, in the shape of the bills of The Bank of Washington, of the nominal value of his note; after the Plaintiff had recovered judgment against the Defendant for the full amount of his note, which judgment could be discharged only by payment in gold and silver coin, of its full amount; after the Plaintiff had sued out his execution, on this judgment, and established a lien for the payment thereof, on all the Defendant's tangible estate and property, real and personal; the General Assembly of North Carolina assumed to pass two Acts, the one on the 17th of March, the other on the 13th of December 1869, whereby, (when construed by the Defendant), so much of the Bank's assets, as is invested in this judgment, is taken away from the Plaintiff, and from the general creditors whom he represents, and from equal *pro rata* distribution among them, and is given to the Defendant, to satisfy *in full* the claim of another creditor, which claim he has voluntarily and with a full knowledge of the fact, acquired since it became valueless.

These Acts of the General Assembly, thus construed and interpreted, are in total disregard and in direct violation of the State's obligation, in its contract with the stockholders of The Bank of Washington that the assets of the Bank, in the hands of the Commissioner, should be distributed equally and rateably among those creditors of the Bank, who should prove their claims in the manner and under the circumstances and conditions prescribed and specified by the Act of 12th of March 1866.

Jos. J. Davis